(24,737)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 471.

THE STATE OF WASHINGTON *EX REL.* GRAYS HARBOR LOGGING COMPANY AND W. E. BOEING, PLAINTIFFS IN ERROR,

vs.

THE SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY, MASON IRWIN, JUDGE THEREOF, AND COATS-FORDNEY LOGGING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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1&2 In the Superior Court of the State of Washington for Chehalis County.

12450.

Filed Nov. 10, 1914. C. S. Reinhart, Clerk. F. S. G.

COATS-FORDNEY LOGGING COMPANY, a Corporation, Petitioner,
vs.
GRAYS HARBOR LOGGING COMPANY, a Corporation; HAYES & HAYES, Bankers, a Corporation, and W. E. BOEING, Respondents.

Transcript.

Filed in the Office of County Clerk, Chehalis Co., Wash. Nov. 9-1914. Luroy Herriman, Clerk, by W. C. Birdwell, Deputy.

3 In the Superior Court of the State of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, a Corporation, Petitioner,
vs.
GRAYS HARBOR LOGGING COMPANY, a Corporation; HAYES & HAYES, Bankers, a Corporation, and W. E. BOEING, Respondents.

Petition.

To the Judge of said Court:

Your petitioner Coats-Fordney Logging Company, a corporation, alleges and respectfully shows to the court:

1.

That the Coats-Fordney Logging Company is a corporation duly organized and existing under and by virtue of the laws of the state of Washington, having its principal place of business in the city of Aberdeen in said state; that it has duly paid all license fees due from it to the state of Washington, and that its entire capital stock has been subscribed; that it has power by the terms of its articles of incorporation, among other things, to do a general logging business, to acquire, own and hold all manner and kind of real estate and timber lands and interests therein, and to construct, maintain and operate a logging railroad or railroads with the necessary spurs, etc., for the purpose of conveying its timber products to market.

2.

That your petitioner for a number of years past, has been engaged in the extensive logging of timber in Chehalis county, Wash-

ington, and is now engaged in the logging of timber lands owned or controlled by it, or in which it has an interest, and that your petitioner has for a number of years past, maintained and operated as a part of its equipment, and as a means of conveying its timber products to market, a private logging railroad, and is now
4 operating and maintaining such private logging railroad for the purpose aforesaid; that said logging railroad extends from the banks of the Wishkah river, in Chehalis county, Washington, in a northerly direction, the northerly terminus of its main line being at the present time, in, at or about Section 31, in Township 19 North, Range 8 West of the Willamette Meridian, in said county and state.

3.

That the respondents above named are all the owners, incumbrancers or persons having any interest in the real estate hereinafter described, as shown by the public records of the county of Chehalis and state of Washington.

4.

That your petitioner is the owner in fee of the southwest quarter (S. W. ¼) of section thirty-two (32) sections thirty (30) and twenty (20), the southwest quarter (S. W. ¼) of section ten (10), the southwest quarter (S. W. ¼) of section three (3), all in township nineteen (19) north of range eight (8), west of the Willamette Meridian, in Chehalis county, Washington, all of which timber lies in a westerly and northerly direction from the lands owned by the respondents, except the southwest quarter (S. W. ¼) of section thirty-two (32). That your petitioner desires to extend its logging railroad from its present northerly terminus in section thirty-one (31), township nineteen (19) north, range eight (8) west of the Willamette Meridian, in a northerly and easterly direction and through the north west quarter (N. W. ¼) of section thirty-two (32), township and range aforesaid, owned by the said respondents, for the purpose of reaching its timber lands hereinabove described and for the purpose of conveying said timber to market. That it is necessary for the proper use and enjoyment of the lands owned by your petitioner, hereinabove described, to have and maintain a private way of necessity, over and across the said northwest quarter (N. W. ¼) of section thirty-two (32), owned by the respondents, said private way of necessity to consist of a right of way on, across, over and through the said northwest quarter
5 (N. W. ¼) of section thirty-two (32), owned by the said respondents, for the purpose of constructing and maintaining thereon a private logging railroad for the purpose of taking over said right of way, and by means of said logging railroad, timber products to be taken from the lands of the said petitioner hereinabove described. That your petitioner has no other available or reasonably practical route over or through which to reach its said timber lands with its said logging railroad, except the route contemplated through the said northwest quarter (N. W. ¼) of section

thirty-two (32), and your petitioner has not any means of ingress or egress to or from said lands except through said northwest quarter (N. W. ¼).

5.

Your petitioner does hereby contract and agree to carry and convey over its said logging railroad, to either termini thereof, any of the timber or other produce of the lands through which such right is desired to be acquired by this proceeding at any and all times so long as said road is maintained and operated, such hauling or carrying to be done at reasonable prices.

6.

Your petitioner further states that it has attempted to come to an amicable agreement with the owners of said land, the above named respondents for said right of way, and the price to be paid therefor, but said owners have refused to grant to your petitioner said right of way or any right of way upon any terms whatsoever.

7.

That the following is a description of the lands, real estate, premises and property sought to be condemned and appropriated herein by your petitioner to-wit:

A strip or piece of land containing three and five tenths (3.5) acres, more or less, being all that part of the northwest quarter (N. W. ¼) of section thirty-two (32), township nineteen (19) north, range eight (8) west of the Willamette Meridian, that lies within twenty five (25) feet on each side of the center line of said proposed logging railroad, as the same has been surveyed over and across said property, said center line being more particularly described as follows:

6 Beginning at a point 179.5 north of quarter corner on the west side of section thirty-two (32); thence 528′ on a tangent whose bearing is N. 38° E. to a point; thence 260′ on a curve to the left whose radius is 713.8 to a point; thence 234′ on a tangent whose bearing is N. 17° E. to a point; thence 394′ on a curve to the right whose radius is 573′ to a point; thence 372′ on a tangent whose bearing is N. 57° E. to a point; thence 521′ on a curve to the left whose radius is 713.8 to a point; thence on a tangent 727′ whose bearing is N. 15° E. to a point on the section line between section twenty-nine (29) and section thirty-two (32), a distance of 1,654′ east of the northwest corner section thirty-two (32) aforesaid.

Wherefore, Your petitioner prays that a jury may be empaneled to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by your petitioner, to said owner or owners, incumbrancers and others interested, for the taking of said lands and premises above described, or in case a jury be waived in the manner prescribed by law, then that the compensation to be made as aforesaid, be ascertained and determined by the court or judge thereof; that upon the payment

of the damages so assessed, into court, judgment be entered appropriating the premises above described to the purposes of your petitioner, as above set forth.

COATS-FORDNEY LOGGING COMPANY,
Petitioner,

By WALTER L. STOUT, *Its Manager.*

BRIDGES & BRUENER,
Attorneys for Petitioner.

STATE OF WASHINGTON,
County of Chehalis, ss:

Walter Stout, being first duly sworn upon his oath deposes and says: That he is the manager of Coats-Fordney Logging Company, a corporation, and affiant makes this verification on its behalf, being thereunto duly authorized; that he has read the foregoing petition, knows the contents thereof, and the same is true as he verily believes.

WALTER L. STOUT.

Subscribed and sworn to before me this 6th day of August, 1914.
[SEAL OF NOTARY.] THEO. B. BRUENER,
Notary Public in and for the State of Washington,
Residing at Aberdeen.

"Filed in the office of County Clerk, Chehalis Co., Wash., Aug. 7, 1914. Leroy Herriman, Clerk, by W. C. Birdwell, Deputy."

7 In the Superior Court of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, a Corporation, Petitioner,
vs.
GRAYS HARBOR LOGGING COMPANY, a Corporation; HAYES & HAYES, Bankers, a Corporation, and W. E. BOEING, Respondents.

Demurrer.

The defendant, W. E. Boeing, now appears and demurs unto the petition in this cause:

1.

Because said petition fails to state facts sufficient to constitute a cause of action, or cause for condemnation of defendant's said lands.

2.

Because the petitioner is without legal capacity to maintain the action.

3.

Because this proceeding, and the statute under which this proceeding is waged, to-wit: Chapter 133 of the Session Laws of 1913

of the State of Washington are contrary to, and in violation of, the constitution of the state of Washington, and of the United States.

W. H. ABEL,
Attorney for Respondent, W. E. Boeing.

P. O. Address: Montesano, Wash.

Service accepted this 20th Aug. 1914.

BRIDGES & BRUENER,
Att'y for Petitioner.

"Filed in the office of County Clerk, Chehalis Co., Wash., Aug. 21, 1914. Luroy Herriman, Clerk."

8 In the Superior Court of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, a Corporation, Petitioner,
vs.
GRAYS HARBOR LOGGING COMPANY, a Corporation; HAYES & HAYES, Bankers, a Corporation, and W. E. BOEING, Defendants.

Demurrer.

The defendant, Grays Harbor Logging Company, now appears and demurs unto the petition in this cause:

1.

Because said petition fails to state facts sufficient to constitute a cause of action, or cause for condemnation of defendant's said lands.

2.

Because the petitioner is without legal capacity to maintain the action.

3.

Because this proceeding, and the statute under which this proceeding is waged, to-wit: Chapter 133 of the Session Laws of 1913 of the State of Washington are contrary to, and in violation of, the Constitution of the State of Washington, and of the United States.

A. M. ABEL,
Attorney for Respondent Grays Harbor Logging Company.

P. O. Address: Finch Building, Aberdeen, Wash.

Service admitted this 20th Aug. 1914.

BRIDGES & BRUENER,
Att'ys for Petitioner.

"Filed in the office of County Clerk, Chehalis Co., Wash., Aug. 21, 1914. Luroy Herriman, Clerk."

9 In the Superior Court of the State of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, Petitioner,
vs.
GRAYS HARBOR LOGGING CO., W. E. BOEING et al., Respondent.

Order on Demurrer.

This cause coming on for hearing on the demurrer of defendant Grays Harbor Logging Company to the petition of petitioner and the same being argued by counsel and the court being fully advised in the premises, it is ordered that the said demurrer be and the same is hereby overruled and denied, to which ruling of the court the said respondent excepts and *his* exception is allowed.

Done in open court this 5th day of Sept. 1914.

BEN SHEEKS, *Judge.*

"Filed September 5, 1914, and entered on page 405 of Journal No. 32. Luroy Herriman Clerk, by W. C. Birdwell, Deputy."

10 In the Superior Court of the State of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, Petitioner,
vs.
GRAYS HARBOR LOGGING CO., W. E. BOEING, et al., Respondents.

Order on Demurrer.

This cause coming on for hearing on the demurrer of W. E. Boeing to the petition of petitioner and the same being argued by counsel, and the court being fully advised in the premises, it is ordered that the said demurrer be and the same is hereby overruled and denied, to which ruling of the court the said respondent except and his exception is allowed.

Done in open court this 5th day of Sept. 1914.

MASON IRWIN, *Judge.*

"Filed September 5, 1914, and entered on Page 405 of Journal No. 32. Luroy Herriman, Clerk, by W. C. Birdwell, Deputy Clerk.

11 In the Superior Court of Washington for Chehalis County.

COATS-FORDNEY COMPANY, a Corporation, Petitioner,
vs.
GRAYS HARBOR LOGGING COMPANY, a Corporation; HAYES & HAYES, Bankers, a Corporation, and W. E. BOEING, Defendants.

Answer.

The defendant, W. E. Boeing, makes answer to the petition herein as follows:

1.

He denies each and every allegation contained in the petition, except, however, it is admitted and alleged that this defendant at the time this proceeding was commenced, owned and he still owns, an undivided one-half interest in fee simple *and* in the lands described in said petition, and except also it is admitted and alleged that the petitioner, Coats-Fordney Logging Company, is a private corporation organized for private purposes under the laws of the state of Washington.

As a defense to said petition this defendant alleges:

1.

That by this proceeding the petitioner seeks to take the said property of this defendant without due process of law, and in violation of the constitution of the United States, and the constitution of the state of Washington. That said attempted taking of the private property of this defendant is for the private use of the petitioner, and not for any public use, and no necessity exists therefor.

12 Wherefore this defendant prays the dismissal of said proceeding at petitioner's cost.

W. H. ABEL,
Attorney for W. E. Boeing, Defendant.

STATE OF WASHINGTON,
County of Chehalis, ss:

W. H. Abel, being first duly sworn on oath, deposes and says: That he is the attorney for W. E. Boeing, one of the defendants herein, and makes this verification on his behalf, because said defendant is at this time absent from Chehalis County and from the state of Washington; that he has read the within answer, knows the contents thereof, and that the same is true as he verily believes.

W. H. ABEL.

Subscribed and sworn to before me this 10th day of September, 1914.

A. M. ABEL,
Notary Public for the State of Washington, Residing at Aberdeen.

Service of the within Answer hereby admitted by receipt of true copy thereof this 11th day of Sept. 1914.

BRIDGES & BRUENER,
Attorneys for Petitioner.

"Filed in the office of County Clerk, Chehalis Co., Wash., Sept. 12, 1914. Luroy Herriman, Clerk, by W. C. Birdwell, Deputy."

13 In the Superior Court of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, a Corporation, Petitioner,
vs.
GRAYS HARBOR LOGGING COMPANY, a Corporation; HAYES & HAYES, Bankers, a Corporation, and W. E. BOEING, Defendants.

Answer.

The defendant, Grays Harbor Logging Company, makes answer to the petition herein as follows:

1.

It denies each and every allegation contained in the petition, except, however, it is admitted and alleged that this defendant at the time this proceeding was commenced, owned, and it still owns, an undivided one-half interest in fee simple in the lands described in said petition, and except also it is admitted and alleged that the petitioner, Coats-Fordney Logging Company, is a private corporation organized for private purposes under the laws of the State of Washington.

As a defense to said petition this defendant alleges:

1.

That it is a corporation duly organized under and by virtue of the laws of the state of Washington; that it has paid its license fees last due unto the state of Washington.

2.

That by this proceeding the petitioner seeks to take the said property of this defendant without due process of law, and in violation of the constitution of the United States, and the constitution of the state of Washington. That said attempted taking of the
14 private property of this defendant is for the private use of the petitioner, and not for any public use, and no necessity exists therefor.

Wherefore this defendant prays the dismissal of said proceeding at petitioner's cost.

A. M. ABEL,
Attorney for Grays Harbor Logging Company, Defendant.

STATE OF WASHINGTON,
County of Chehalis, ss:

C. H. Shutt, being first duly sworn on oath, deposes and says: That he is the manager of the defendant, Grays Harbor Logging Company, and makes this verification in its behalf; that he has read the within answer, knows the contents thereof, and that the same is true as he verily believes.

C. H. SHUTT.

Subscribed and sworn to before me this 10th day of September, 1914.

A. M. ABEL,
Notary Public for the State of Washington, Residing at Aberdeen.

Copy admitted this 11th Sept., 1914.
BRIDGES & BRUENER,
Att'ys for Petitioner.

"Filed in the office of County Clerk, Chehalis Co., Wash., Sep. 12, 1914. Luroy Herriman, Clerk, by W. C. Birdwell, Deputy."

15 In the Superior Court of the State of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, a Corporation, Petitioner,
vs.
GRAYS HARBOR LOGGING COMPANY, a Corporation; W. E. BOEING, and HAYES & HAYES, Bankers, a Corporation, Respondents.

Order of Condemnation.

This matter having come on to be heard before the court, on the question of necessity and the preliminary order of condemnation, on the 24th day of September, 1914, Bridges & Bruener appearing for the petitioner, A. M. Abel appearing for the respondent Grays Harbor Logging Company, and W. H. Abel appearing for the respondent W. E. Boeing, and the respondent Hayes & Hayes, Bankers, making no appearance whatsoever, and the petitioner having introduced its testimony and the said respondents having introduced their testimony, and the matter having been argued to the court, and the court having taken the same under advisement, and later the court having rendered an opinion herein in favor of the petitioner and holding that the order of condemnation should be made herein as prayed for, and now the court being satisfied in the premises, doth find, decide, determine and adjudge as follows:

I.

That the petitioner Coats-Fordney Logging Company, is a corporation duly organized and existing under and by virtue of the laws of

the State of Washington and having its principal place of business in Aberdeen in said state; that it has duly paid all license fees due from it to the state of Washington; that its entire capital stock has been subscribed, as provided by law; that under its articles of
16 incorporation, it has power and authority, among other things, to do a general logging business and to acquire, own and hold all manner and kind of real estate and timber lands and interests therein, and to construct, maintain and operate logging railroads with the necessary spurs, switches, sidings, etc., for the purpose of conveying its timber products to market.

II.

That the respondent Grays Harbor Logging Company, is a private corporation organized and existing under and by virtue of the laws of the state of Washington, and that said last named respondent, together with the respondent W. E. Boeing, are the owners of the northwest quarter (N. W. ¼) of section 32, township 19, north range 8, west of the Willamette Meridian in Chehalis county, Washington, and are the only owners or persons interested in the said lands, as shown by the records of the said county, except the respondent Hayes & Hayes, Bankers, whom the records show, or tend to show, at the time of the commencement of this action, had some lien upon or interest in the said lands by mortgage or otherwise. That said mortgage has been satisfied since the commencement of this action and Hayes & Hayes have now no interest therein.

III.

That the said petitioner is the owner of all of section 30, and all of section 20, and the southwest quarter (S. W. ¼) of section 10, and the southwest quarter (S. W. ¼) of section 8, all in township 19, north of range 8, west of the Willamette Meridian in said Chehalis county, and which said lands so owned by petitioner have upon them large quantities of valuable timber, all of which said lands and timber lie to the north of the northwest quarter (N. W. ¼) of said section 32 so owned by the said respondents.

IV.

That the petitioner for a number of years last past, has been extensively engaged in the removal of timber in the said county, and still is so engaged, and that it has been and is so removing its said timber by means of a private logging railroad, thus bringing said
17 timber to tidewater in the Wishkah river, thence said timber being brought to market down said river in tidewater; that in its said logging operations the petitioner has constructed, maintained and operated, and now has constructed and is maintaining and operating, a fully equipped logging railroad, the main line of said logging railroad extending from the easterly bank of the Wishkah river in tidewater, northerly to its northerly terminus on its said main line at a point in section 31, township 19, north of range 8 west, in said county, and the said railroad is and has been full

equipped for logging purposes; that the petitioner is desirous of removing the timber from its lands as above described, and in order to so do is desirous of extending its said main line northerly through a part of the said N. W. ¼ of said section 32 so owned by respondents.

V.

That it is necessary for the proper use and enjoyment of the petitioner's said lands and for the removal of the timber thereupon by petitioner, to have and maintain a private way of necessity over and across the said N. W. ¼ of said section 32, said private way of necessity to consist of a right-of-way over and across said last named quarter section of land, for the purpose of constructing and maintaining thereon a private logging railroad in order to take over said right-of-way and said railroad, the timber products of the lands so owned by the said petitioner; that the petitioner has no other available or reasonably practical route over or through which to reach the said timber lands with its said logging railroad, except the route sought to be acquired herein, a particular description of which is hereinafter set out; that in order to remove the said timber by means of its said logging railroad or otherwise, it is necessary that the said petitioner cross over and upon lands which it does not own and over which it has no control and through which it has no rights-of-way for logging purposes.

18

VI.

That due and regular service of notice and petition herein has been had upon the said respondents and all thereof, in the manner and way provided by law, and this court has jurisdiction of the subject matter of this action and each and all of the said respondents for the purposes of this action.

VII.

That in the petition herein and by means of testimony introduced at the hearing, the petitioner has contracted and agreed to carry and convey over its said logging railroad, to either termini thereof, any of the timber or other products of the lands of the said respondents, through which said right-of-way is sought to be acquired, at any and all time, so long as said road is maintained and operated, such hauling or carrying to be done at reasonable prices.

VIII.

That prior to the commencement of this action the petitioner attempted to come to an amicable agreement with the said respondents, for the purchase by the petitioner, of the right-of-way in this action sought by it, but the petitioner and the respondents have been unable to agreed upon the terms and conditions of such proposed right-of-way.

IX.

The right-of-way hereinabove mentioned and sought to be acquired, is a strip of land 50 feet in width over and across a portion of the N. W. ¼ of section 32, township 19, north range 8, west of the Willamette Meridian in Chehalis county, Washington, said strip containing 3.5 acres, more or less, and which said strip of land is 25 feet on each side of and parallel with the following described center line through said N. W. ¼ of section 32, to-wit:

19 Beginning at a point 179.5 north of quarter corner on the west side of section 32; thence 528′ on a tangent whose bearing is N. 38° E. to a point; thence 260′ on a curve to the left whose radius is 712.8 to a point; thence 234′ on a tangent whose bearing is N. 17° E. to a point; thence 394′ on a curve to the right whose radius is 573′ to a point; thence 372′ on a tangent whose bearing is N. 57° E. to a point; thence 521′ on a curve to the left whose radius is 713.8 to a point; thence on a tangent 727′ whose bearing is N. 15° E. to a point on the section line between section 29 and section 32, a distance of 1654′ East of the northwest corner section 32 aforesaid.

X.

It is therefore ordered and adjudged that the said petitioner is entitled to condemn and appropriate the aforesaid right-of-way for the purpose of constructing thereupon its said private logging railroad, together with all proper or necessary spurs, switches, sidings or other improvements proper or necessary in the orderly construction, maintenance and operation of its said railroad, and to maintain, equip and operate such railroad only for the following purposes, to-wit: For the removal of any and all timber products located and being upon section 30, section 20, the S. W. ¼ of section 10, and the S. W. ¼ of section 8, all in township 19, north range 8, west of the Willamette Meridian, in Chehalis county, Washington.

And it is further ordered and adjudged that the said cause be set down for trial for the assessment of damages for the taking, damaging or injuriously affecting the said property, and to ascertain, determine and assess the damages and compensation to be made in money by the said petitioner, irrespective of any benefits from any improvement proposed by the said petitioner, to the respondents, for the taking, damaging or injuriously affecting the said land, premises and property.

And it is further ordered that the said cause be and the same is here set down for trial before a jury, on the 26th day of October, 1914.

20 To all of which said order each of the respondents Boeing and Grays Harbor Logging Company excepts and exceptions are allowed.

Dated this 15th day of October, 1914.

MASON IRWIN, *Judge.*

"Filed October 16, 1914, and entered on page 498 of Journal No. 32. Luroy Herriman, Clerk. By W. C. Birdwell, Deputy Clerk.

21 In the Superior Court of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, Petitioner,
vs.
W. E. BOEING et al., Respondents.

Respondents' Proposed Findings of Fact.

Come now the respondents, Grays Harbor Logging Co., and W. E. Boeing, severally, and each for himself, and requests the court to make the following proposed findings of fact herein:

1.

That at the time this action was commenced, and ever since, the Grays Harbor Logging Co. and W. E. Boeing, each owned, and still own, in fee simple, an undivided half interest in the N. W. ¼ of section 32, township 19, north range 8 west, W. M. That the defendant, Hayes & Hayes, Bankers, has no interest in, nor lien upon said lands.

Found.

Exception allowed petitioner.

MASON IRWIN, *Judge.*

2.

That the petitioner owns section 30, in said township 19 north range 8 west. That said section contains about 16,000,000 feet of merchantable timber. That the east fork of the Wishkah river is distant from the west line of said lands about 200 feet.

Found. Exception allowed petitioner.

MASON IRWIN, *Judge.*

22 3.

That section 20 in said township 19 north range 8 west, contains about 20,000,000 feet of merchantable timber; that said land is distant from the east fork of the Wishkah river at the nearest point, about one-half mile.

Found. Exception allowed petitioner.

MASON IRWIN, *Judge.*

4.

That the southwest quarter of section 8 in said township is owned by petitioner; that the east fork of the Wishkah river touches one corner of said lands and the same can be logged into said river; that no necessity exists for condemning the right of way for the removal of the timber from said southwest quarter of section 8, if it is considered as a tract separate from the other lands of petitioner. That there is about 4,500,000 feet of merchantable timber upon said land.

Found. Exception allowed petitioner.

MASON IRWIN, *Judge.*

23 5.

That the southwest quarter of section 10 in said township is owned by petitioner, and contains about 12,000,000 feet of merchantable timber. That same can be logged into the east fork of the Wishkah river a distance at the nearest point of about one mile, and that same can be logged much more easily and cheaply into said river then by petitioner's proposed railroad; that no necessity exists for condemning a right of way for the removal of the timber from said southwest quarter of section 10.

Refused. Exception allowed defendants.

MASON IRWIN, *Judge.*

6.

That none of the petitioner's said lands are of value other than for the timber thereon. That at the rate the petitioner's logging operations have been, or, can and will be carried on, all of said timber will be removed within the period of about one year.

Refused. Exception allowed defendants.

MASON IRWIN, *Judge.*

24 7.

That the petitioner has a friendly understanding with the Weyerhaeuser Timber Co., which is the owner of the northeast quarter of section 31 in township 19 north range 8 west, whereby, upon request, it can and has obtained the right to extend its road across said lands into section 30, township 19 north range 8 west.

Refused. Exception allowed defendants.

MASON IRWIN, *Judge.*

8.

That no absolute necessity exists for the crossing by petitioner of the northwest quarter of section 32, township 19 north range 8 west.

Refused. Exception allowed defendants.

MASON IRWIN, *Judge.*

9.

That each of the tracts of land owned by petitioner can be logged into the east fork of the Wishkah river by crossing lands belonging to the Weyerhaeuser Timber Co.; that the relations between the petitioner and said Weyerhaeuser Timber Co. are such that upon mere request, it can obtain the right to cross said Weyerhaeuser Timber Co.'s lands.

Refused. Exception allowed defendants.

MASON IRWIN, *Judge.*

25 10

That it is feasible to log all of petitioner's timber upon all of petitioner's said lands into the east fork of the Wishkah river. That

the cost thereof would not be greater than by logging the same by means of the petitioner's proposed logging railroad.

Refused. Exception allowed defendants.

MASON IRWIN, *Judge.*

11.

That the east fork of the Wishkah river, and the Wishkah river, are navigable streams down which large quantities of logs have been removed from lands similarly situated to the lands of the petitioner; that said river affords any easy, quick and cheap way of conveying logs to the market upon Grays Harbor.

Refused. Exception allowed defendants.

MASON IRWIN, *Judge.*

"Filed in the office of County Clerk, Chehalis Co., Wash., Oct. 16, 1914. Luroy Herriman, Clerk. By W. C. Birdwell, Deputy."

26 In the Superior Court of the State of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, a Corporation, Petitioner,

vs.

GRAYS HARBOR LOGGING COMPANY, a Corporation; W. E. BOEING, and HAYES & HAYES, Bankers, a Corporation, Respondents.

Respondents' Exceptions.

1.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 1, contained in the order and decree of condemnation, and to each and every specific fact found therein.

2.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 4, contained in the order and decree of condemnation, and to each and every specific fact found therein.

3.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 5, contained in the order and decree of condemnation, and to each and every specific fact found therein.

4.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 6, contained in the order and decree of condemnation, and to each and every specific fact found therein.

27

5.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 7, contained in the order and decree of condemnation, and to each and every specific fact found therein.

6.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 8, contained in the order and decree of condemnation, and to each and every specific fact found therein.

7.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 9, contained in the order and decree of condemnation, and to each and every specific fact found therein.

8.

The respondents severally except to the finding of fact numbered 10, and to the order and decree contained therein.

9.

The respondents except to the refusal of the court to make and find the respondents' proposed finding of fact number 2, as proposed by respondents, and to the refusal of the court to find that the easiest and cheapest way to log said section 30 is into the east fork of the Wishkah river.

10.

The respondents except to the refusal of the court to make and find the respondents' proposed finding of fact number 3, as proposed by respondents, and to the refusal of the court to find that the easiest and cheapest way to log said section 20 is into the east fork of the Wishkah river.

28

11.

Respondents except to the refusal of the court to find respondents' proposed finding of fact number 4, and to the refusal of the court to find that the east fork of the Wishkah river runs through said lands, and to the refusal of the court to find that the southwest quarter of section 8 can be logged more cheaply and easily by the river than by railroad.

12.

Respondents except to the refusal of the court to make respondents' proposed finding number 5.

13.

Respondents except to the refusal of the court to make respondents' proposed finding number 6.

14.

Respondents except to the refusal of the court to make respondents' proposed finding number 7.

15.

Respondents except to the refusal of the court to make respondents' proposed finding number 8.

16.

Respondents except to the refusal of the court to make respondents' proposed finding number 9.

17.

Respondents except to the refusal of the court to make respondents' proposed finding number 10.

18.

Respondents except to the refusal of the court to make respondents' proposed finding number 11.

29

A. M. ABEL,
Attorney for Grays Harbor Logging Company.
W. H. ABEL,
Attorney for W. E. Boeing, Respondents.

Each of the foregoing exceptions are hereby severally allowed this 17th day of October, 1914.
Dated in open court this 17th day of October, 1914.

MASON IRWIN, *Judge.*

"Filed in the office of County Clerk, Chehalis Co., Wash., Oct. 17, 1914. Luroy Herriman, Clerk, by W. C. Birdwell, Deputy."

30 In the Superior Court of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, a Corporation, Plaintiff,
vs.
GRAYS HARBOR LOGGING COMPANY, a Corporation; HAYES & HAYES, Bankers, a Corporation, and W. E. BOEING, Defendants.

Precipe.

To the Clerk:

Please prepare transcript for use on appeal containing petition, demurrer of W. E. Boeing, and order thereon, demurrer of Grays Harbor Logging Company, and order thereon, answer of W. E. Boeing, answer of Grays Harbor Logging Company; findings of fact and decree, respondent's proposed findings of fact, exceptions,

order settling statement of facts, admission of service of proposed statement of facts, writ of review from supreme court of Washington and this precipe.

W. H. ABEL,
Attorney for W. E. Boeing.
A. M. ABEL,
Attorney for Grays Harbor Logging Company.

"Filed in the office of County Clerk, Chehalis Co., Wash., Oct. 26, 1914. Luroy Herriman, Clerk, by W. C. Birdwell, Deputy."

31 In the Superior Court of the State of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, a Corporation, Petitioner,
vs.
GRAYS HARBOR LOGGING COMPANY, a Corporation; HAYES & HAYES, Bankers, a Corporation, and W. E. BOEING, Respondents.

Certificate of Clerk.

STATE OF WASHINGTON,
County of Chehalis, ss:

I, Luroy Herriman, County Clerk and ex-officio clerk of the superior court of the state of Washington, for Chehalis county, do hereby certify that the foregoing is a full, true and complete transcript of so much of the record and files in the above entitled cause excepting the order settling statement of facts, none having been entered as I have been directed by the appellant to transmit to the supreme court of the state of Washington.

In testimony whereof, I have hereunto set my hand and affixed the seal of said superior court, this 9th day of November, A. D. 1914.

[SEAL.]

LUROY HERRIMAN,
County Clerk and Ex-officio Clerk of the Superior Court of the State of Washington for Chehalis County,
By W. C. BIRDWELL,
Deputy Clerk.

32 12450.

Filed Nov. 10, 1914. C. S. Reinhart, Clerk. F. S. G.

33 In the Superior Court of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, a Corporation, Plaintiff,
vs.
GRAYS HARBOR LOGGING COMPANY, a Corporation; HAYES & HAYES, Bankers, a Corporation, and W. E. BOEING, Defendants.

Admission of Service.

Received from W. E. Boeing and Grays Harbor Logging Company, respondents, a copy of the proposed statement of facts of said respondents the 24th day of October, 1914, after the original proposed statement of facts had been filed in the office of the clerk of the above entitled court, said copy served upon me containing a copy of the filing mark upon the original thereof.

Dated October 26, 1914.

BRIDGES & BRUENER,
Attorneys for Coats-Fordney Logging Company.

34 & 35 In the Superior Court of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, a Corporation, Plaintiff,
vs.
GRAYS HARBOR LOGGING COMPANY, a Corporation; HAYES & HAYES, Bankers, a Corporation, and W. E. BOEING, Defendants.

Notice of Filing Statement of Facts.

To Coats-Fordney Logging Co. and to Bridges & Bruener, its attorneys of record herein:

You and each of you are hereby notified that the defendants in the above entitled action have filed in the above entitled Court and cause a Proposed Statement of Facts, a copy of which is hereto attached, which the said defendant will ask the above entitled Court to certify as the Statement of Facts to be used on appeal in said cause, and to which they will hereafter at the time of certification request the Court to direct the Clerk to attach the exhibits heretofore filed in this cause.

A. M. ABEL,
Attorney for Defendant Grays Harbor Logging Company.
W. H. ABEL,
Attorney for Defendant W. E. Boeing.

Receipt of copy of the foregoing notice together with a copy of Proposed Statement of Facts, showing the filing marks of the Clerk

of the Superior Court, is hereby acknowledged this 24th day of October, 1914.

BRIDGES & BRUENER,
Attorneys for Plaintiff.

Filed in the office of County Clerk, Chehalis Co., Wash., Oct. 24, 1914.

LUROY HERRIMAN, *Clerk,*
By W. C. BIRDWELL, *Deputy.*

Filed in the office of County Clerk, Chehalis Co., Wash., Nov. 5, 1914.

——— ———, *Clerk,*
By ——— ———, *Deputy.*

Filed in the office of County Clerk, Chehalis Co., Wash., Nov. 5, 1914.

LUROY HERRIMAN, *Clerk,*
By W. C. BIRDWELL, *Deputy.*

36 & 37 In the Superior Court of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, a Corporation, Plaintiff,
vs.
GRAYS HARBOR LOGGING COMPANY, a Corporation; HAYES & HAYES, Bankers, a Corporation, and W. E. BOEING, Defendants.

Defendants' Proposed Statement of Facts on Appeal.

The above entitled cause having come on regularly to be heard before the Honorable Mason Irwin, presiding judge, on September 24, 1914; plaintiff being represented by its attorney of record, J. B. Bridges; defendant, Grays Harbor Logging Company, being represented by its attorney of record, A. M. Abel; defendant, W. E. Boeing, being represented by his attorney of record, W. H. Abel; and defendant, Hayes & Hayes, Bankers, not appearing, its default having been duly entered, the following proceedings were had and testimony taken, to-wit:

W. L. STOUT, a witness called to the stand for and on behalf of plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By J. B. Bridges:

Q. What, if any, connection do you have, Mr. Stout, with the petitioner, Coats-Fordney Logging Company?
A. Manager of that company.
Q. Are you its representative on the grounds?
A. Yes sir.

Q. I hand you a paper and ask you to state what it is?
A. The articles of incorporation of the Coats-Fordney Logging Co.
Q. Is that one of the originals, originally executed copies?
A. Yes sir.

38 (Articles of Incorporation offered in evidence as Plaintiff's Exhibit A.) (Received with permission to withdraw and supply a copy.)

Q. I ask you to look at the paper which I hand you and state what it is?
A. Subscription of the capital stock of the Coats-Fordney Logging Co.

Mr. Bridges: Paper offered as Plaintiff's Exhibit (B).
W. H. Abel: I object thereto for the reason that the authority of the A. F. Coats Logging Co. to subscribe to the stock of the Coats-Fordney Logging Co. is not shown, and there is no statutory right of the one company to subscribe for the stock of another.
The Court: Objection overruled.
Exception.
Exhibit (B) read into the record.

ABERDEEN, WASH., Sept. 26, 1910.

We, the undersigned, hereby subscribe for the number of shares of the Coats-Fordney Logging Company set opposite our names hereto and we agree to pay therefor in any manner provided by law:

A. F. Coats, by B. F. Johnson	875 shares
B. F. Johnson	437½ shares
Joseph W. Fordney, trustee	2,187½ shares
A. F. Coats, by B. F. Johnson, secretary	6,500 shares

W. H. Abel: Objection because the promise is too indefinite.
The Court: Objection overruled.
W. H. Abel: I admit that the license fee of the Coats-Fordney Logging Co. for the current year and prior years has been paid.
A. M. Abel: Makes the same stipulations on behalf of Grays Harbor Logging Co.

Q. Mr. Stout, is the Coats-Fordney Logging Co. the owner of the Southwest Quarter of Section 32, Township 19, Range 8, W. in Chehalis County?
A. Yes sir.
Q. And is it the owner of Sections 20 and 30 in the same township and range?
A. Yes, sir.

39 Q. And is it the owner of the Southwest Quarter of Section 10 in the same township and range?
A. Yes sir.

Q. And of the Southwest Quarter of Section 8 of the same township and range?
A. Yes sir.
Q. And is it also the owner of the timber on those lands?
A. Yes, sir.

Mr. Bridges: I have here the deeds showing ownership.
W. H. Abel: We have no objection to the testimony going in.

Q. I ask you whether or not, Mr. Stout, you know approximately the amount of timber on these various lands?
A. I think I do.
Q. Merchantable timber I am speaking of?
A. Yes sir.
Q. State approximately the amount of merchantable timber on Section 30?

W. H. Abel: I would like to examine the witness.

Q. Are you a cruiser?
A. No, sir.
Q. Have you ever cruised this land?
A. No, sir.
Q. Personally you have no knowledge?
A. We have the timber cruisers' estimates on it.

W. H. Abel: Objection as hearsay and not the best evidence.

Q. Have you been over the lands sufficiently to know something concerning the amount of timber on them?
A. Yes. Just a moment, with the exception of Section 20 I have not been over that.
Q. Take Section 30 what do you know about the timber on that section?

W. H. Abel: Objection.

Q. I would like for you to state, if you know, approxi-
40 mately the amount of merchantable timber on Section 30?
A. About 15 millions.
Q. You say you have no personal knowledge about the other?
A. I haven't been over.
Q. Have you had it cruised by a competent cruiser?
A. Yes sir.
Q. What amount of merchantable timber does he report?

W. H. Abel: Objection.
Sustained.

Q. Have you been at all over Section 20?
A. No.
Q. Or any of the other lands mentioned in the complaint?
A. I have been on the Southwest of 32.
Q. What can you say about the amount of timber there, the quantity?
A. Five and one-half or six million feet.

Cross-examination.

By W. H. Abel:

Q. These lands, so far as you know, have about the ordinary amount of timber that is found upon such lands in western Washington?
A. We have the cruises showing the timber that is on them.
Q. I am not asking as to the cruises. (Question read.)
A. I think they do.

CLYDE MARTIN, a witness called to the stand for and on behalf of plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By J. B. Bridges:

Q. Where do you live, Mr. Martin?
A. Stillwater, Wash.
Q. With what company, if any, are you connected?
A. Weyerhauser Timber Co.
Q. In what capacity?
A. Logging engineer.
Q. What are your duties? Explain them more fully.
A. Well, I look over the country in advance of logging, prepare topographical maps, lay out logging roads, superintend con-
41 struction of them, etc.
Q. Is it your duty among other things to determine the most practicable location of logging railroads and the most practicable way of removal of timber?
A. Yes sir.
Q. How long have you been engaged in that kind of work?
A. About seven and one-half years.
Q. And you are now engaged in that character of work for the Weyerhauser Timber Company?
A. Yes, sir.
Q. Did you do some work of that character for the Weyerhauser Timber Co. in Chehalis County and up the Wishkah River?
A. I did.
Q. When did you do that?
A. In the spring of 1910, I believe.
Q. I show you a map, Mr. Martin, and ask you to state what it is?
A. That is a tracing of the map I made at that time.
Q. I will ask you whether it is substantially correct*ly* as to what is shown upon it?
A. It is.
Q. What are the various figures shown other than section figures?
A. Oh, Contour figures, showing elevation above sea level, etc.
Q. What is the continuous black line running through a part of this map?
A. The proposed location of a logging railroad.
Q. And what is the dotted line?

A. It is the proposed location of the road.

Mr. Bridges: We offer the map in evidence.
W. H. Abel: Objection because the map is not complete.
(Map received for the purpose of showing the topography of the country and marked Plaintiff's Exhibit (C). Exception.)

42 RAY JOHNSON, a witness called to the stand for and on behalf of plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By J. B. Bridges:

Q. Where do you reside?
A. Aberdeen.
Q. What is your business?
A. Surveyor for the Coats Fordney Logging Co.
Q. What experience have you had in work of that character?
A. Well, just the experience with that company, 4 years about.
Q. Have you made a survey for the proposed logging railroad through the Northwest Quarter of Section 32?
A. Yes sir.
Q. When did you make that survey?
A. I made it during the summer, along about May.
Q. I show you a map and ask you who made that map?
A. I made it.
Q. Was that made in accordance with your surveys?
A. Yes sir.
Q. What does this map cover? What lands?
A. It covers the Northwest Quarter of 32.
Q. What do the wavy lines on this map indicate?
A. Those are the contour lines of the ground.
Q. This is marked here new county road and old county road. That is correct substantially?
A. Yes sir.
Q. What is the line, that continuous black line, formed with circles?
A. That is the location of the proposed road.
Q. I will ask you whether or not these locations and figures and contour lines, etc., are substantially correct?
A. They are.

43 Mr. Bridges: We offer the map in evidence.
W. H. Abel: Objection as immaterial. Its correctness not shown, the accuracy of the survey and the contour lines not shown.
Over-ruled.
Map marked plaintiff's Exhibit (D).

Q. I will ask you to state whether the particular description of the center line is correct without going into further detail?
A. Yes, it is.

Q. And what is the width of your right of way on either side of your center line?

A. Twenty-five feet.

Q. Making a right of way fifty feet in width, 25 feet on each side Have you looked at this map which Mr. Martin identified?

A. Yes sir.

Q. Do you observe where he shows his proposed road through the Northwest Quarter of 32?

A. Yes sir.

Q. Now, how is your proposed road located with reference to that?

A. Well, it is very close to it but it is a little bit to the east of it.

Q. Has this company a logging railroad to the south of this land of this 32?

A. Yes sir.

Q. I wish you would describe that in a general way, where it commences and where it is now.

A. Well it commences at the landing in Section 22-18-9.

Q. That is in tide water, is it?

A. Yes sir.

Q. How far is the landing above Aberdeen?

A. About 6 miles.

44 Q. Then it goes up the hill.

A. And up the river.

Q. In what general direction?

A. In a northeast direction almost.

Q. Or in other words, generally speaking, up the Wishkah River and the east branch of it?

A. Yes sir.

Q. The railroad now constructed is on the divide between the Wishkah and the Wynooche Rivers?

A. Yes sir.

Q. And to what point, or approximately what point, has the road been completed and in operation speaking with reference to this Section 32?

A. Well, it is about 2,400 feet from it.

Q. From the westerly line of this Northwest Quarter?

A. Yes sir.

Q. What is the length of that road?

A. It is 6½ miles from the landing to the present end of the road.

Q. Has that road been in operation as a logging railroad?

A. Yes sir.

Q. Now, state the character of the country, or particularly the topography, the hills and valleys and things of that character in this Northwest of 32 and immediate vicinity of that?

A. Well, it is the backbone of the main ridge goes right through it. That is the main ridge between the Wishkah and the Wynooche and on the other side the canyons get very deep very quickly.

Q. Would it be practicable to extend this logging railroad to the

north of this northwest quarter of section 32 in any manner or place without crossing the northwest quarter of 32?

A. No, sir, there is no possibility. There is a possibility but then it is not practicable.

Q. Do I understand you to say it is not practicable to extend this railroad to the north without crossing through the North-
45 west quarter of 32?

A. Yes sir.

Q. And have you selected the most practicable route to go through this northwest quarter?

W. H. Abel: Objection as leading and calling for the conclusion of the witness.

Over-ruled.

A. Yes.

Q. Now, going back to Ex. (C) your road as surveyed apparently does not touch Sec. 30, which the petition claims here they want to log. Have you made a survey for an extention of your road north of 32 with a view to cutting the timber in sections 20 and 30?

W. H. Abel: Objection to witness answering that question from the map produced by the Weyerhauser Timber Co.

Mr. Bridges: You need not testify from this map.

A. Yes, I ran the preliminary as far as Section 16.

Q. Looking at this Exhibit (C) I wish you would point out to the court substantially how your line was run after going through the Northwest Quarter of 32 and how you expect to get the timber out of Section 30?

W. H. Abel: Objection as not proper. He testified it has only been a preliminary survey. Object to testifying from the map of the Weyerhauser Timber Co.

Q. Testify how when this road goes through here you can utilize it in getting the timber out of 30?

The Court: I would like to have a map that has your line on.

Mr. Bridges: We haven't the map here, your Honor.

Q. What is the present terminus of your road?

A. Well, it is just 2,400 feet from that line. Crosses the line 179½ feet from the corner post.

Q. What line?

A. This north and south line of the west side of 32.

Q. Where is your road, the end of your road with reference to this——

A. It is diagonally across here.

46 Q. Your road terminates in the woutheast quarter of 31, does it?

A. Yes sir.

Q. Now, what part of that quarter does it terminate?

A. Well, it is a thousand feet from this quarter line to here.

Q. Take my pencil and mark a cross at the point where your road now terminates?

W. H. Abel: I would like to show that that is located west of the center of the southwest quarter of section 31.

Q. How does your road in a general way, your survey, go from that point up to where you touch the westerly line of section line, of the northwest quarter of 32?

A. It is nearly in a northeasterly direction.

Q. Does it follow anywhere near close to this line?

A. It shows very close.

Q. Does it cross the west line of the northwest quarter of section 32 anyways near where this map shows the line to cross?

A. No. It crosses the line 179½ feet north of this quarter post.

Q. What quarter post?

A. The quarter post of the northeast side of the section.

Q. Would that be the south or north?

A. It would be below the county road.

Q. Do you cross the county road in getting to the northwest quarter in your survey?

A. Yes, after you go in here you cross right through there.

Q. Just take this pencil and mark on this map substantially the location of the extension of your road from its present terminus through the Northwest quarter of 32 and up to the center of 29?

W. H. Abel: I submit that there is no accuracy or certainty in evidence of this kind.

Mr. Bridges: We are now seeking to show this that being once through this northwest quarter of section 32 we don't run
47 up against a mountain but that we can extend the road so as to cut the timber in Section 20 and Section 30, that is all that is necessary.

The Court: That is all right but I would like to have a map that has your road marked on it.

(Map produced showing the Northwest quarter of section 32.)

Q. How do you intend after you get your road extended through the northwest quarter of 32 to cut the timber in section 30?

A. The road will go straight to almost the center of 29, thence turning west it will go into about the center of 30. (Indicates.)

Q. How do you get your timber in section 20?

A. Continue the line on to 20.

Q. Will your line follow substantially the line of the railroad shown on this Exhibit (C)?

W. H. Abel: Objection as leading. The witness has said that all they have done so far is to make a preliminary survey.

The Court: I understand he has indicated the route they would take to get to 20.

A. You cut across there.

Q. You say your main line will run up near the center of section 29 and then will it be a branch that will go off to section 30 for the purpose of getting the timber?

A. Yes sir.
Q. And then the main line will be extended up to section 20?
A. Yes sir.
Q. Have you a practicable way of building your main line and your branches after you get through section 32 in order to get your timber in these other sections?
A. Yes sir.
Q. How about getting the timber in the southwest of 8 and the southwest of 10? Is there a practicable way of extending the road on up so as to get that timber?
A. Yes sir.

48 Cross-examination.

By W. H. Abel:

Q. Now the petitioner, Coats Fordney Logging Co., has at this time a right of way through section 31, township 19 north, range 8 west?
A. Yes, sir, I understand it has.
Q. But you expect to use only part of that right of way or do you expect to use all of it?
A. We expect to use all of it.
Q. Have you your survey notes with you, Mr. Johnson?
A. Yes sir. (Notes produced.)
Q. Now, where is your survey through 31?
A. Starts here at the end of the line. At 216 plus 12 crosses the line.
Q. Crosses the north line of 32?
A. Crosses the west line.
Q. Have you any preliminary or final survey crossing the north half of section 31? You are now in the south half of 31.
A. You mean across this ridge?
Q. Crossing the north half of 31.
A. I ran a line of levels from the quarter post to the corner.
Q. Right along the section line?
A. Yes sir.
Q. Have you got your field notes?
A. Yes sir.
Q. When did you run your line of levels along the section line between 31 and 32?
A. It was in August.
Q. Can you fix the date in August by reference to your book or otherwise?
A. No, I didn't put the exact date down.

49 Q. Was it after you ran your preliminary line crossing the north half of 32?
A. Yes sir.
Q. How long after?
A. About three months.
Q. Who was with you?
A. I had a rod man.

Q. Who?
A. Cecil Johnson.
Q. Your brother?
A. No, a cousin.
Q. Have you anyway for you to fix the date that you took those levels along the section line between 31 and 32?
A. No, I can't remember whether it was early in the month or later.
Q. The petition in this case was sworn to on August 5, 1914. Would you say it was after that date?
A. I don't know.
Q. You ran no preliminary line through 31 except along the line between the two sections 31 and 32?
A. I ran one other line.
Q. When was that?
A. It was three years ago.
Q. Have you your notes of that?
A. Yes sir, I have those.
Q. Is this the original book?
A. No.
Q. This book that you now produce is a little account book. A third of the book is produced and two-thirds has been cut off.
A. All the notes are there. That was simply a bunch of levels that was taken for the purpose of seeing how deep the creek was about 1,500 feet south of the corner.
Q. When did you make this copy of the notes?
A. I made it the same day that I made that.
Q. Wasn't this made recently?
50 A. No, sir.
Q. These notes are in the center of the book and isolated from anything else. Do you know how deep the creek is or how much of a fill would have to be made or trestle if the line was run from its present terminus north across your own lands instead of going half a mile out of your way upon your neighbor's lands?
A. Well, it would be 232 feet deep after we had run at 1½% grade for 1,400 feet, the length of the bridge.
Q. Isn't it true that the length of the bridge would only be 300 feet if you ran north over your own lands instead of going on the north half of 32?
A. The curves were enough to make that. I went on the curves enough to make 1,400 feet at 1½% grade.
Q. What is the heaviest grade upon the Coats Fordney Logging Co.'s road at present?
A. It is 1½% to haul loads up except at the — where they have a run of about 500 feet. It is made steeper there to keep them from getting on top.
Q. I am asking you for the heaviest grade.
A. Do you mean to pull loads up or let them down?
Q. Either way?
A. The line from the landing up to the top of the hill is 5%.
Q. That is on your main line?
A. Yes, sir.

Q. Your line is six miles long. What other grades have you either way?

A. Two and one-half per cent is the steepest anywhere on the top of the hill when we are going in with empties.

Q. How deep cuts have you on the main line?

A. We have one of 42 feet, that is the deepest.

Q. And fills and trestles?

A. Only one trestle.

Q. And that is what?

A. About 70 feet.

51 Q. How long is that trestle?

A. Only about 300 —.

Q. Do you know what that cost?

A. No, sir.

Q. Don't you work out an estimate of costs?

A. That trestle was built before I was there.

Q. It was torn down and rebuilt since you have been there?

A. No, sir, not that one.

Q. Have you made any estimate of cost of building this line through 32?

A. I estimated it would cost——

Q. I am asking if you have made an estimate in detail?

A. No, not in detail.

Q. Have you any figures on the subject which you can produce now?

A. No, I haven't.

Q. Are you the only engineer of the company?

A. Yes sir.

Q. Your father is a stock-holder?

A. Yes sir.

Q. Your father is B. F. Johnson?

A. Yes sir.

Q. Have you made any estimate of what the cost would be to extend your line north through the north half of section- 31-19-8, keeping upon the company's own lands and going directly into section 30 which the company owns instead of going half a mile to the east and then back again?

A. It is too impracticable.

Q. I am asking whether you have made an estimate of costs?

A. No.

Q. It can be done, don't you think?

A. It can be done, yes.

Q. It would be nearly a mile shorter?

52 A. Yes, it would be shorter.

Q. It would be a mile shorter because under the proposed route you are going from the east line of 32 and veer away to the east and then back. The main line would be about a mile shorter if you kept upon the company's own lands with this road?

A. Yes, sir.

Q. Are you prepared to state to the court what the average cost per mile of building this main line logging road is?

A. It is about a dollar a lineal foot to have it ready for the rails.
Q. Does that include ties?
A. I don't think so. The ties and rails make it about $8.
Q. Making the grade cost $5,280 a mile?
A. Yes, sir.
Q. Now, then do you know what it would cost to build the half mile of road crossing the north half of section 31 so as to enter directly into section 30, that is keeping upon the company's own land or land upon which it has a right of way at present?
A. It would cost about $40,000.
Q. How do you get your figures, Mr. Johnson?
A. A bridge 230 feet high and 2300 feet long would cost $25,000. That would be just a wooden trestle at that.
Q. What else?
A. The road would cost more than that to keep up because the grade would be steep.
Q. You have never taken any levels across there, have you?
A. Yes, sir.
Q. I thought you said you had not, only along the east line.
A. I got that in the book.
Q. Have you any way of fixing the date you made these notes?
A. No.
53 Q. And you worked out no estimate of costs three years ago?
A. No, sir.
Q. Please read the first line and tell the court what it means.
A. Started at an elevation on the preliminary survey of 210.
Q. Is that shown?
A. The elevation is 100 assumed that. The back sight was 7½. This would be your height of instrument.
Q. What is that?
A. 107 feet and 5 inches. I went to station 1, 7 feet and 1 inch.
Q. What elevation?
A. That was the reading on the right. You subtract that from your height of instrument and you get your elevation at that point.
Q. What was the elevation at station 1?
A. One hundred feet and four inches.
Q. So in the hundred feet there was a raise of four inches?
A. Yes sir.
Q. The last column indicates the elevations, does it?
A. Yes sir.
Q. And the first column indicates the stations?
A. Yes sir.
Q. The stations are how many feet?
A. One hundred feet.

W. H. Abel: As bearing upon the practicability of the petitioner extending its road north through sec. 31, I offer these notes.
Mr. Bridges: No objection (Defendant's Exhibit 1).

Q. What was your initial point in your preliminary survey running north to the north half of 31 three years ago?
A. That was on the south line of the northeast quarter of 14.

(Referring to map of Weyerhauser Timber Co.'s proposed road.)

Q. How many miles away?
A. About four miles from here. No, three miles from here.
Q. Then is it three miles from the initial point of the preliminary survey shown by your contour map, which is Exhibit D?
A. About 3½ miles from there.
54 Q. Well, station one would be the initial point, would it?
A. Yes, or station zero. We started at a switch.
Q. Then station 1 would be 100 feet from the initial point?
A. Yes sir.
Q. That is down in section 14?
A. Yes sir.
Q. Then these notes which you now produce don't cover the north half of 31 at all?
A. We figured that as a branch and started the numbering over. This No. 210 we started at on the main line. Numbers 1, 2 and 3 are on a branch.
Q. Now, this long trestle 1400 feet long and 230 feet high which you say would have to be built if the road was run across the north half of section 31, can you locate where that trestle would have to be built?

(Exhibit C marked with pencil in section 31, northeast quarter.)

Redirect examination.

By J. B. Bridges:

Q. You have been asked some questions as to whether your line could be extended from your present terminus across the northeast quarter of section 31 in order to cut the timber in 30? Now, I understand you to say that that is not a practicable route because of the long and expensive and high trestle, is that correct?

W. H. Abel: Objection as leading.
Sustained.

Q. I will ask you whether or not it is practicable to so do?
A. No, it isn't.
Q. Give your reasons why it is not and all your reasons?
A. In the first place it is a very poor grade 1½% for 230 feet.
Q. Is that an excessive grade?
A. It is on curves. Also it would be a long bridge and is too high.
55 Q. What is the height of that bridge?
A. 232 feet.
Q. And what would be the length of it?
A. 1400 feet.
Q. And what would be the approximate cost of that bridge?
A. Nothing less than $25,000.
Q. Is there any objection in railroad building in that locality to the bridge aside from the cost?

A. *It* a logging railroad it has a very great objection because if there is every a wreck it would be destroyed.

Q. Is there any objection on account of fire?

A. Yes, sir, very great objection.

Q. If you came down a grade extending north of 1½% and then across this bridge that you have mentioned you would then be at the south line of section 30 and could cut the timber in section 30 by that?

A. Yes sir.

Q. What would it cost approximately to construct the line from your terminus to the south line of section 30?

A. Very close to $40,000.

Q. How about your cost of operation? Would it be any expense for operating?

A. Yes, sir, very dear.

Q. Suppose you spend your $40,000 or thereabout and have your line up to the south line of section 30 so that you can cut your timber off of 30, how would you then go so as to extend your line to get the timber off of 20?

W. H. Abel: Objection because it does not appear that the witness has made any preliminary survey.

Q. Have you been through section 20 and know the lay of the land?

A. Yes sir.

Q. Go ahead.

A. You would have to continue your line and keep on that side right into 20.

56 Q. Would it be practicable to construct a main line from the south line of section 30 on up into section 20?

A. From here to there it is the same thing.

Q. What are these field notes that were introduced in evidence?

A. That is field notes, started from 210 and ran a branch line down there.

Q. The field notes show this branch line we have been talking about last?

A. Yes.

Q. Now, Ray, when did you make your final survey of your road through the northwest quarter of 32?

A. I think it was in May, 1914.

Q. And when did you determine that you could extend your line from its present terminus up to connect with the line that you are seeking to condemn through 32?

A. It was all done at the same time.

Q. You started at the present terminus of your line, did you?

A. Yes, sir.

Q. And continued your survey through section 32 is that correct?

A. Yes sir.

Q. Now, you are speaking concerning some grades, you speak of one 5% grade on the main line, where the road is now constructed, is that an up hill or down hill pull?

A. The loads have brakes set and are floating down.
Q. That is down hill. You speak of a 2½% somewhere else. Was that up hill or down hill?
A. That was up hill.
Q. What was the length of that approximately?
A. Approximately one thousand feet.
Q. Where was that located? How far below 32?
A. About 2 miles.

57 Q. About how much per miles will it cost to extend your road from its present terminus along your line of survey up to about the middle of section 29 where you say you will branch off to cut the timber in 30, about how much per mile to construct it?

A. It will cost $5,280 for the grade and I don't know what the price of steel is. It amounts up to about $8,000 something.
Q. For a mile?

The Court: After constructing the grade the cost of steel would be the same anywhere.

Q. What would be the difference in length approximately in your road if you left the present terminus of your road and went through over this long trestle and then through 30 up to 20? What would be the difference in length of that line and your proposed line?
A. I would say it would be longer.
Q. Which would be?
A. To go down across the trestle and through 30 and 20 it would be longer by about 8,000 feet.

Recross-examination.

By W. H. Abel:

Q. Have you made any surveys through section 30?
A. Just an aneroid survey. We ran a preliminary up to 16.
Mr. Bridges: From your present terminus?
A. No, from 14.
Q. Where are your notes?
A. In that book.

E. G. HUNT, a witness called to the stand for and on behalf of plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By J. B. Bridges:

Q. You are a civil engineer, Mr. Hunt. Have been for many years in this county?
A. Yes sir.
Q. Have you constructed some railroads and made surveys for them?
A. Yes.

58 Q. Now, are you acquainted with the location of the Coats-Fordney road as it now is?

A. Yes sir.
Q. And you know about where it terminates, do you, at the north?
A. Yes sir.
Q. Have you made any investigations concerning the extension of that road to the north and through section 32?
A. Yes.
Q. I wish you would state to the court what is the most practicable route for the extension of that road to the north in order to get the timber out of sections 30 and 20?
A. The most practicable route is approximately where it is staked through, entering the quarter section not far from the southwest corner of the quarter section and running northeast diagonally through the section along the divide between the Wynooche and Wishkah rivers. That is the most practicable route for a railroad line.
Q. It appears that the terminus of the road is near the center of the southeast quarter of 31 and there has been some question about building the road to the north through the north half of 31 in order to get the timber in 30, what can you say about the practicability of that?
A. Absolutely impracticable, would not be entertained by any engineer.
Q. For what reasons?
A. The topography of the country is not suitable for railroad lines. There is a creek runs down through a very deep ravine and the cost of damming to put a road across there would be enormous, absolutely impracticable. Would not consider it.

Cross-examination.

By W. H. Abel:

Q. Have you ever been upon the north half of section 31?
59 A. Yes sir. For once I have been on it, I cruised section 31 about 18 years ago, the whole section.
Q. Did you take any levels across section 31?
A. No, not across there. I have taken levels across section 31 but that was for the county road.
Q. Have you those levels?
A. No.
Q. When was that?
A. Last January.
Q. Did you take any levels along the proposed road?
A. No.
Q. How long were you there?
A. About three hours.
Q. Just went and looked at it and formed your opinion and came away?
A. Yes sir.
Q. Did you cross 31 at that time?
A. I did.
Q. Who was with you?

A. Ray Johnson.
Q. Where di- you go on your three hours' trip?
A. Went through 32 as far as the line was surveyed in 32 and went out to the line between 31 and 32 and looked at the country in 31, the northeast quarter of 31.
Q. That was the extent of your tour?
A. Yes sir.

Redirect examination:

Q. Were you acquainted with that country in a general way before this trip?
A. Yes, I told Mr. Stout before I went up.

W. H. Abel: Objection as hearsay.

Q. You say you had cruised 31 some years ago?
A. Yes sir and I had surveyed the road through it last winter.
60 Q. Which road is that?
A. What is called the Wishkah-Wynooche road, just constructed.

CLYDE MARTIN, being recalled to the stand for and on behalf of plaintiff, testified as follows:

Direct examination.

By J. B. Bridges:

Q. Mr. Martin, do you know the present terminus or approximately the present terminus of this logging road is?
A. Yes.
Q. Now is there any practicable route for a logging railroad extending to the north from this terminus than one going through the northwest or through any part at any rate of the northwest quarter of section 32?
A. No.
Q. There has been some talk here about commencing at the terminus of this railroad and extending north through the northeast quarter of 31, what do you think about the practicability of a road going through there?
A. It is absolutely impracticable.
Q. Give your reasons why?
A. It crosses the creek and canyons too low down and makes the expense too heavy.
Q. Go into some more detail about getting a road through any place in the northeast quarter of 31?
A. It would require more or less grade against the logs and high trestles. Aside from the natural objection of a road going up that divide the country is such there that from cognizance over the country an engineer would not be justified in running a line over it.
Q. Approximately what would it cost to construct a wooden bridge or trestle? 1,400 feet long and 232 feet high.

61 A. A bridge of that size would cost $40,000. or $50,000.

Q. What objections are there from a railroad standpoint to the maintenance and operation over such a bridge?

A. Well, it requires replacement in a few years. Very expensive to keep. There is danger of fire.

Q. Would a bridge in this place necessarily be on a curve?

A. I don't know.

Q. If it were on a curve would that increase the objections?

A. It depends on the curve it had with a bridge of that height.

Q. From your examination of that country in the immediate neighborhood of this northwest quarter of 32 and in 31 do you know or have you been able to find any practicable route for the extension of this railroad to the north than the one which has been testified upon?

A. No.

Q. Whether through the northwest quarter of 32 or any part of 32 or any part of 31?

A. No, I do not know of any other location than that through that northwest quarter.

Q. About how much per mile would it cost to build the ordinary logging railroad say from the present terminus of the road on for two or three miles over the surveyed land you have testified about?

A. I believe my estimate at the time was approximately $10,000. a mile fully equipped. That is with the ballast.

Cross-examination.

By W. H. Abel:

Q. Mr. Martin, the map which you produced and testified from is a tracing itself. Did you make this map, Exhibit C?

A. I made the map from which this tracing was made.

Q. I asked did you make this tracing?

A. No, I did not.

Q. Who did make it?

A. I assume Mr. Johnson made it.

61½ Q. Have you made any comparison of the two?

A. Yes.

Q. Where is that map?

A. I believe it is in the office of the Coats-Fordney Logging Co.

Q. That shows a good many more contour lines than this map?

A. No, not many more.

Q. Did you take any levels on the north half of 31-19-8?

A. No, sir.

Q. You were there for the last time three years ago?

A. On section 31?

Q. In the vicinity?

A. I have been there several times since.

Q. When?

A. I don't know the exact dates. I was in there two or three times when the Grays Harbor Logging Co. were operating there.

Q. Well, do you mean to tell the court that you have any inde-

pendent recollection of the topography of the north half of 31 other than you have received since you were on the witness stand?

A. Yes sir.

Q. Your memory has been refreshed since hearing Mr. Johnson testify?

A. Certainly, been refreshed.

Q. You don't however remember whether there would be any curves if the line was run crossing the north half of 31 or not?

A. It would be impossible to tell anything about that until you ran a railroad location.

Q. You made no survey on the north half of 31?

A. No railroad survey.

Q. Nor did you take any levels on the north half of 31?

A. No.

Q. Is there more than one canyon to cross?

A. Do you refer to a line on the east or west?

62 Q. Anywhere across the north half of 31.

A. There would be a number of canyons to cross if you keep off the northwest quarter.

Q. Crossing the northwest quarter is there more than one canyon?

A. I only remember one.

Q. The proposed route here crossing the north half of 32 has to cross that same canyon just a little further up?

A. I don't know that it does.

Q. Do you testify that it does not have to?

A. I don't testify. I don't remember.

Q. If the line is completed as proposed by the Coats-Fordney Co. and after crossing the north half of 32 was run down into 30 would it cross the same canyon or any canyons?

A. I didn't investigate section 30.

Q. Would the proposed line across 32 cross any canyons?

A. No.

Q. You say it would not?

A. It would cross no canyon that I remember.

Q. Do you know whether there would be any heavy cuts or not?

A. No particularly heavy cuts.

Q. Is it not true there would be a cut of at least 35 feet in one place?

A. I don't know. I didn't run any levels across there.

Q. Then you didn't determine what the cuts would be?

A. No.

W. B. MACK, a witness called to the stand for and on behalf of plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By J. B. Bridges:

Q. You live at Aberdeen and have for a great many years?

A. Yes sir.

63 Q. Been engaged in the logging business in this county for a great many years?
A. Yes sir.
Q. Have you engaged in railroad logging?
A. Yes sir.
Q. Have you constructed or had supervision of the construction or laying out of some logging railroads in this county?
A. Yes sir.
Q. Have you recently viewed the proposed line of this petitioner's railroad from its present terminus through the northwest quarter of 32?
A. Yes sir.
Q. When?
A. Yesterday.
Q. With whom?
A. Mr. France, Mr. Stout and Mr. Johnson.
Q. Did you make any investigation while you were there as to whether or not a road could be built practically north through section 31, not go through 32?
A. No, there is only one route.
Q. Where is that?
A. That is up through the northeast of 32, up through 32.
Q. Following the survey?

W. H. Abel: Objection as leading.

A. It is the natural backbone of the country there between the two rivers and there are ridges running from that like ribs in the human carcass practically. You have got to follow the backbone and the backbone is shown on that line. You can imagine that as the neck of a bottle and that neck of land has got that country bottled.

64 Cross-examination.

By W. H. Abel:

Q. You are not a surveyor?
A. No sir.
Q. You are not a railroad engineer?
A. All you need is common sense.
Q. You went up there as a friend of the court or plaintiff?
A. I went up there as a friend of the plaintiff at his request?
Q. You saw through his glasses in looking at the situation?
A. No, sir, my judgment is not biassed.
Q. Were you on 31?
A. No, we were on the ridge looking down on 31.
Q. What ridge?
A. The ridge in 32.
Q. What part of 32 were you on?
A. We crossed up back of the old county road looking down on 31.

Q. Did you see any grade stakes?
A. Yes sir.
Q. Did you cross to the north line of 32?
A. No sir.
Q. How long were you on this trip, Mr. Mack?
A. We were on the ground there about two and a half or three hours.
Q. What time did you leave Aberdeen?
A. Eight something. I don't recall exactly.
Q. Did you go by auto?
A. By auto to the landing, near the landing.

EUGENE FRANCE, a witness called to the stand for and on behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By J. B. Bridges:

Q. Mr. France, you are the owner of considerable timber in Chehalis County?
65 A. Some.
Q. Were you on this trip yesterday with Mr. Mack and Mr. Stout?
A. I was.
Q. Did you go up to the present northerly terminus of the Coats-Fordney Logging Co.'s road and then on to the proposed right of way through section 32?
A. Yes sir.
Q. I will ask you to state in your own way whether or not that is a practicable road for the extension of that railroad to the north?

W. H. Abel: Objection because the witness has not shown himself qualified as an expert to express an opinion.
The Court: You had better show.

Q. What experience have you had with logging and railroading?
A. Well, I put in two or three hundred million feet of a railroad before I came to this country. I have been interested in a railroad here several hundred million and I have built some railroad.
Q. All right. Now you may answer my previous question.
A. Well, from the ground that I went over this appeared to be the best and only feasible route for putting in a logging railroad.
Q. Is that route a feasible and practicable route?
A. I should judge it was.

Cross-examination.

By W. H. Abel:

Q. What railroads have you built, Mr. France?
A. Well, I helped, I constructed a logging road of my own and I helped construct a logging road over in Pacific County.
Q. You helped finance them, that was all you did?
A. Well, financing and I looked over the road also, etc.

Q. You gave this matter in hand the most casual inspection?
A. I didn't examine it thoroughly.
66 Q. You went up because you were a friend of the other side and had your opinion in advance?
A. No sir.
Q. How did you come to go?
A. I went because Mr. Stout asked me. I am as friendly to one of these parties as the other.
Q. Did he tell you what he wanted?
A. He said he wanted the route there and was forced to condemn a right of way.
Q. Mr. France, how long a trestle will have to be built across the north half of 32 in building this railroad?
A. On the land I went over I don't think they would have to build any trestle.
Q. Would there be any?
A. Very little.
Q. Would there be any cuts?
A. Yes, there would be cuts there twenty feet.
Q. Did you see grade stakes?
A. I didn't.
Q. Did you determine what the cut would be from the grade stakes?
A. No, I didn't look specially at grade stakes. I looked at the nature of the ground.
Q. Did you see any profile map?
A. Yes, I had a profile made of all that country years ago.
Q. When did you see a profile map?
A. I saw the profile map first at the camp and then I saw it in Mr. Bridges' office. In fact one of the profile maps was one that was made by a surveyor that I employed to go over that country for Mr. Lowe and myself and Mr. Burrows.
Q. Do you know what the output of the Coats-Fordney Logging Co. is per month?
A. No, I don't know exactly. I could not say.
67 Q. Would it run up to several million feet of merchantable timber?
A. Oh yes, from their equipment there I should think it would run probably from six to eight million feet.
Q. Six to eight million feet a month?
A. I should think so.

RAY JOHNSON, a witness called to the stand for and on behalf of plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By J. B. Bridges:

Q. Referring back to Exhibit 3, being this tracing, who made this tracing?
A. I made that tracing.

Q. From what?
A. From a tracing that Mr. Martin made.
Q. Was that the original?
A. That was the original.
Q. You made this from the original?
A. Yes sir.
Q. Is this a correct copy of the original?
A. As near as it could possibly be. It is exactly the same.
Q. What is this paper that I hand you?
A. That is the profile showing the heights of the cuts and fills.
Q. Through what?
A. Through this northwest quarter of 32.
W. H. Abel: I would like to get into the record just what the figures show. What does each square represent?
A. Each square vertically represents one foot, each small square. Each ten squares are 100 feet. Each ten small squares horizontally are 100 feet.
The Court: That is each large square is 100 feet and each small square 10 feet?
A. Yes sir.
68 Q. Now state to the court some of the more important cuts and fills.
A. There is a small fill there of 12 feet and then there is a cut here that averages from — part of this would go that way would be 7½. The largest part of that cut is 20.8 feet; then there is a fill 22.8 feet; then there is a cut of 19.2 feet; a small cut of 2.7 feet; a cut of 22.4 feet; a fill of 11.9 feet and a cut of 41.4 feet.
Q. Would there be any trestle or bridge across there?
A. None whatever.
Q. Will your cuts take care of the fills practically?
A. Yes, more than take care of them.

Mr. Bridges: Map offered in evidence.

W. H. Abel: This is the original profile map?
A. Yes sir.
Q. This also represents the level road, does it?
A. Yes sir.
Q. The black dotted line crossing the map?
A. That would be the finished road.
Q. And this zigzag line represents the contour of the surface of the ground at present?
A. Yes sir.

W. H. Abel: No objection. (Map marked Plaintiff's Ex. (E).)

Cross-examination.

By W. H. Abel:

Q. From the profile map can you tell the court how many gulches or canyons you have to fill there?
A. These are the head of the draws. There is one there, one, two,

three, four, that is about the same one, that is four, five. There is no water in those.

Q. Not at this time of the year?

A. Except when it rains.

69 B. F. JOHNSON, a witness called to the stand for and on behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By J. B. Bridges:

Q. You live at Aberdeen?

A. Yes sir.

Q. Are you connected with the Coats-Fordney Co. as stockholder and officer?

A. Yes sir, I am.

Q. What officer?

A. I am secretary and director.

Q. Are you connected with the active management of this road now?

A. Not now.

Q. You were?

A. Yes sir.

Q. For how long?

A. Six years.

Q. When did you sever your connection?

A. January of this year.

Q. Did you construct any portion of that road?

A. Yes sir.

Q. About how much of it, branches and all?

A. Oh, I don't know, probably twenty miles.

Q. Did you ever have any other experience with railroads?

A. Why, no, not before I went up there. I had logged but not with railroads.

Q. You know where the present terminus of the road is?

A. Yes sir.

Q. Was that terminus when you severed your relation as manager?

A. Yes sir.

Q. Are you acquainted with the topography of the country to the north of the present terminus?

70 A. Yes sir.

Q. I wish you would state whether or not you have looked over and made some examination at any rate of the timber on section 30?

A. Yes sir.

Q. About how much timber is there?

A. I figure about 15 million.

Q. Have you made some examination of the timber on section 20?

A. Yes sir.

Q. How much there?
A. About 20 million.
Q. Also the same question with reference to the northwest quarter of 8?
A. I never was on 8.
Q. You have had it cruised, have you?
A. Yes sir.
Q. What does your cruise show?
A. Four and one-half million.
Q. Now the same question with reference to the southwest quarter of 10?
A. I never was on 10.
Q. Have you had that cruised?
A. Yes sir.
Q. What does that show?
A. Twelve million.
Q. Your company is also the owner, is it, that is really admitted, of the southwest quarter of section 32?
A. Yes sir.
Q. Is it true that in order to cut that do you not have to go through the land in question?
A. We do not have to.
Q. Will your road be extended in order to get that timber in 32?
71 A. Almost to the quarter post.
Q. Now, Mr. Johnson, have you been over section 31 and particularly the northwest quarter of 31?
A. Yes, sir, been all over.
Q. And also have you been over the proposed new road or extension of the line? In 32 and to the north of that?
A. Yes sir, to 16.
Q. What is the most practicable route for the extension of your road to the north?
A. Through 32 and 29 and 31.
Q. I will ask you whether or not it would be practicable to extend your road from its present terminus from the northeast quarter of 31 and into section 30?
A. It would not.
Q. Give your reasons why?
A. The topography of the country is such that it would be prohibitive. The cost to build a bridge so high as that bridge would have to be, it would be prohibitive.
Q. Do you know about what would have to be the size of that bridge?
A. I had the levels run there three years ago and it would be 252 feet high and 1,400 feet long.
Q. What would be the approximate cost of such a bridge?
A. It would be between $35,000 and $40,000.
Q. What kind of a grade would you have?
A. We run down on a 1½% grade going down to the bridge, adverse grade.

Q. That is you would pull your load up a 1½% grade?
A. Yes, even by running 1½% down we have got this height of bridge.
Q. Do you know of any other route other than the one that is now sought which would be a practicable way of extending this road and taking the timber out in sections 20 and 30 and these two quarter sections above?
A. I do not.

72 Cross-examination.

By W. H. Abel:

Q. Has the company a contour map of the north half of 31 or any part of it?
A. I don't know. I never made one.
Q. Your company had one made that you know of?
A. No, I don't know.
Q. What is the output of the Coats Fordney Logging Co. per month?
A. Well, it varies all the way from six to nine million a month.
Q. To log the southwest of 32 all that would be necessary would be to run a branch line or spur into that section?
A. Yes sir.
Q. Isn't it true that you had a road extending a little south into section 6 of the township below?
A. No.
Q. Didn't you have a road down logging 6?
A. We are logging 6.
Q. That is a branch line running south?
A. You might call it all branch line.

W. L. STOUT, a witness called to the stand for and on behalf of plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By J. B. Bridges:

Q. Mr. Stout, have you made any investigations with a view of extending your road from its present northerly terminus northerly through the northeast quarter of section 31 for the purpose of cutting your timber to the north of that?
A. Yes.
Q. I will ask you whether or not it is practicable so to do?

W. H. Abel: Objection the witness has not shown himself qualified.

73 Q. What experience have you had on that question?
A. I have been with construction and engineering firms both in the field and office department for 15 years, 16 years.
Q. How long have you been in charge as manager of this company?

A. Since the first of January.
Q. Have you given since that time this question of the extension of that road considerable study and consideration?
A. Yes.
Q. Have you been over these lands with a view of looking into the question of extension?
A. A number of times.
Q. Now you may answer my question?
A. It is not practicable.
Q. Why not?
A. The topography of the country is not such that we can go over.
Q. Go more into detail.
A. The ground drops off too steeply into the stream and out again for us to put a grade into there and for a bridge it is too high and long, too expensive.
Q. About what would the length and height of that bridge have to be?

W. H. Abel: Objection because it is too indefinite as to location.

Q. The most favorable route in the northeast quarter what would have to be the height and length of the bridge?
A. I would estimate that at from 100 to 200 ft. according to the location.
Q. Is there more than one place where you could get through there extending your road northerly through the northeast quarter of section 31? How would you go through there if the road had to be built there? Where would it be built practically?

W. H. Abel: Objection to the witness being led by being shown a map.
Overruled.
Exception.

74 A. The only possible way would be to point a landing in this direction, to the left. (Map marked.)
Q. That is not the question I asked, Mr. Stout. If you should extend your line from its present terminus north?

W. H. Abel: I object to counsel pointing to another place.

The Court: The question is to go from that point up to here which way would you go.
A. Follow this survey around here, approximately here.
Q. What would be the approximate cost of construction of your road from its present terminus up say to the center of 29 per mile?
A. It would be from $8,000 to $10,000 per mile according to the weight of steel used and whether or not you ballast.
Q. Are you in the habit of ballasting your road?
A. We are not.
Q. Suppose you did not ballast it and used such steel as you are using?
A. $8,000.

Q. After you had removed your timber what would be your salvage?
A. Approximately $3,000 a mile.
Q. So that for the purpose of taking off this timber your expenses would be something like $5,000 a mile?
A. Yes sir.
Q. Have about how many miles taking off sections 20 and 30?
A. Have two miles or two and one half including the spurs.
Q. Do you know of any other practicable way of removing this timber of yours to market except in the manner in which you are now seeking to acquire?
A. I do not.
Q. You asked for a fifty-foot right of way. I will ask you whether or not a right of way of that width is necessary?
A. Well, it is the least that we think we can get along with.
75 Q. Have you made any effort heretofore or before the commencement of this suit to come to an agreement with the owners of this property concerning the purchase of a right of way?
A. I have.
Q. Were you able to come to any?
W. H. Abel: Objection as calling for a conclusion and not for any fact.
Overruled.
Exception.
A. No sir.
Q. Has your company in the event of a right of way being obtained through this northeast quarter of section 32, are you willing and able and will you contract with and agree with the owners or those interested in the land through which you are getting your right of way to remove to either terminii of your road or haul such timber or other products as may be offered from that land?
A. We would be willing to do that.

Cross-examination.

By W. H. Abel:

Q. What has been your occupation for the past 13 years, Mr. Stout?
A. I have been with the Slade Lumber Co. for about ten years.
Q. In what capacity?
A. I started in there as book-keeper and worked up to assistant manager.
Q. But it was a clerical work that you were doing the whole time?
A. No, sir, it was not.
Q. Do you want the court to understand that you are a practical engineer, construction engineer?
A. I haven't said that.
Q. You have had no experience whatever in the building of railroads?

A. I have.
Q. When and where?
A. With the Slade Lumber Co.
76 Q. What did you have to do with the building of their road?
A. From the nature of my position I was quite often consulted.
Q. What did you do?
A. I was consulted where it was to be built. I had been over the ground most of it where it was. I knew the cost of it, both the estimate and the actual.
Q. Has the Coats Fordney Logging Co. made any preliminary survey through the northeast quarter of 31?
A. Yes.
Q. Other than along the section line?
A. I think there have been several preliminaries made.
Q. By whom? What engineers?
A. I think Ray Johnson has been over it several times and there may have been others. They have been looking that ground over.
Q. You say others. Whom for example. Ray Johnson has testified what he did.
A. You mean who worked for the Coats Fordney Logging Co. or any other engineer? Mr. Martin has been over that and Mr. Hunt has been over it.
Q. You say that it would depend upon the location of a logging railroad across the northeast quarter of 31 as to whether the trestle would be 100 feet high or 200 feet high?
A. I think I said that.
Q. Then the quarter section is not uniform in respect to topography, is it?
A. No.
Q. At what point would the trestle be 100 feet high across the [illegible]heast quarter of 31?
A. I could not answer that definitely.
Q. Is that owing to your lack of knowledge of the situation?
A. That is an estimate I made.
77 Q. When did you make that estimate?
A. Well, sir, I have been over that ground a half a dozen times.
Q. When did you make the estimate?
A. The first time I went over it.
Q. When was that?
A. The first part of this year.
Q. Well, could you tell which forty acre tract the trestle would be 100 feet high across the northeast quarter of 31?
A. Well, I think you will find my answer according to where it was placed and the grade. If you come down the canyon your trestle would be shorter, the greater would be your grade.
Q. At what point would the trestle be 100 feet high?
A. I can't answer that question I said.
Q. Why not?
A. Because it is an estimate.

Q. What would the grades be at the place where it is 100 feet high?
A. One and one-half to two per cent.
Q. But you have no survey to confirm your opinion upon the subject?
A. That is my estimate.
Q. Did you ever reduce that estimate to writing?
A. No, sir.
Q. Which way do the water courses flow crossing the northeast quarter of 31?
A. Practically northwest, west of northwest.
Q. How many water courses are there upon that quarter section?
A. I could not say exactly. I do not know.
Q. Take the east half of the northeast quarter of section 31, are there any water courses upon that eighty acres?
A. I don't know. The river may run through that. I am not sure.
Q. What river?
A. A branch of the Wishkah.
Q. Does that branch of the Wishkah have a name? If so, what is it?
78 A. The east fork.
Q. Do you swear that the east fork of the Wishkah River flows through the northeast quarter of 31?
A. No, sir, I do not.
Q. The fact is, is not this true that you are totally unfamiliar with the situation there?
A. No, sir, that is not true.
Q. Why did you mention the east fork of the Wishkah River if it did not flow through there?
A. I didn't say it did.
Q. Why did you mention it?
A. It is not very far away.
Q. How far and in which direction?
A. In a westerly direction.
Q. How far away?
A. I could not mention the distance.
Q. A mile or two miles?
A. It runs west of section 30.
Q. That would be at least a mile from this land?
A. Yes sir.
Q. If a logging railroad was built through the northeast quarter of section 31, how many canyons would have to be crossed?
A. There is one big canyon there with its tributaries.
Q. How many draws are there or tributaries?
A. Quite generally cut up there. I don't know just how many.
Q. How recently have you been over this land?
A. I was up there yesterday.
Q. Were you on the northeast of 31 yesterday?
A. Yes.
Q. You heard the testimony of France and Mack who say they

were there with you and who say they were not on that quarter section, were you with them?

A. Not all the time.

79 Q. What part of the northeast of 31 were you on yesterday?

A. About the north line of 31.

Q. Just now you spoke of the east fork of the Wishkah River as being along the west line of section 30, is that correct?

A. It flows near.

Q. What is to prevent the logging of section 30 into the east fork of the Wishkah River? It is navigable there, is it not?

A. It is cheaper to log it by rail and we do not own the water front on the east fork.

Q. There is a driving company operating on that east fork?

A. I have been told there was.

Q. There are dams there?

A. Yes.

Q. How far would it be to log that timber on section 30 into the east fork?

A. It would not be very far as to distance but it would not be as cheap.

Q. How far when you say not very far?

A. I never measured the distance according to the map; it is a very short distance.

Q. Well, how far is that, you mean a few yards?

A. I could not say just how far. Runs right near.

Q. Can you tell what kind of a country it is? Is it down hill to the water?

A. Yes, part of it.

Q. If you do not know how far, how can you give an estimate of the cost of putting it into the water?

A. I know it is not a mile.

Q. It is entirely feasible, is it not, to log into water a distance of a mile or more under conditions prevailing in this general locality?

80 A. I don't think it would be in that case.

Q. Why not in this case more than any other case?

A. You can log cheaper over a railroad than into water.

Q. How much cheaper?

A. Well, I would say 75¢ to a dollar cheaper.

Q. What is your cost of logging by rail?

A. I estimate it would cost us to put that spur——

Q. I am asking as to the cost of logging by rail. I am not asking for the cost of the spur. You mean the spur into 30?

A. Yes, I estimate that would be about 60¢ to 65¢ a thousand.

Q. And what advantage then would there be in not logging directly into the navigable water?

A. We have other timber there and we have no rights to cross over section 32.

Q. Do you have to cross anything? Whose land do you have to cross?

A. I think it belongs to the Grays Harbor Logging Co.
Q. Have you ever investigated that way of taking the timber out?
A. Not except to estimate what it would cost to put in the water.
Q. When did you make that estimate? Since you do not know the distance how did you get your estimate?
A. Well, that would be a railroad show and the other would be hauling it over a skid road.

Redirect examination.

By J. B. Bridges:

Q. You said I think on cross examination that it would be cheaper to log it by railroad?
A. Yes, sir.
Q. You are speaking now of what timber?
A. Section 30.
Q. How much cheaper would it be to you to take it out by railroad if extended up there than to take it out by this water?
A. That would depend on the cost of driving in the river.
81 Q. What is the charge on the main river that is from the forks down to the boom?
A. From our landing is 50¢.
Q. From the forks, where the east fork of the Wishkah comes on to the main river, beginning with the main river the Wishkah Boom Co. operates?
A. Yes.
Q. What is their charge?
A. We have never put any logs in. I do not know.

Recross-examination.

By W. H. Abel:

Q. The Coats Fordney Logging Co. controls the Wishkah Boom Co.; the two are allied, have the same stockholders and the same directors?
A. They may have.
Q. You know that. Your brother-in-law, or Mr. Warren Egerer, runs the one company, you run the other?
A. Mr. Egerer is not my brother-in-law. I do not know anything about his business.
Q. He is a relative of yours. You are sure that you do not know anything about his business?
A. I don't make a point of bothering about his business.
Q. You are the son-in-law of J. W. Fordney?
A. Yes sir.
Q. And J. W. Fordney is the main man of the Wishkah Boom Co.?
A. He may be.
Q. And Warren Egerer, his nephew, runs the Wishkah Boom Co.?
A. Yes sir.
Q. And Mr. Johnson, the secretary of the Coats Fordney Logging Co., is one of the main men of the boom company?

A. I don't know what his position is in the boom company.

Q. The Coats Fordney Logging Co. have an understanding with the Weyerhauser Timber Co.

A. We never had any difficulty.

82 Q. You can get it upon mere request?

A. I presume so.

Q. Section 25 in the adjoining township, section 30 adjoins 25, that is owned by the Weyerhauser Timber Co., is it not?

A. I don't know.

Redirect examination.

By J. B. Bridges:

Q. What are the advantages, if any, of logging by railroad over logging in water, fresh water, a stream like these forks?

A. Logging by railroad you could get your output out practically the same day in the same condition that the logs are put in. Putting them in fresh water you are subject to a great many delays on account of water, etc.

Q. What are the delays in getting logs out?

W. H. Abel: Objection because the witness does not appear to have any acquaintance with operations on this fork.

The Court: Answer if you know.

Q. On the east fork of the Wishkah River and the main river from there on where the east fork runs into the main river?

A. From where these logs would naturally go from 30 there would be much delay apparently.

Q. Take section 20, could that be economically logged into the river?

A. I have never been on it. The distance is too far.

Q. About what would be the distance of the average haul on 20?

W. H. Abel: Objection would he know other than looking at the map.

The Court: The record would show that the river is on the west line of section 19.

Q. Who owns section 18?

A. I think the Grays Harbor Logging Co.

Q. Have your company any rights over that land to haul logs? Does it belong to the Weyerhauser Timber Company?

83 A. I don't think it does.

Q. Has your company any right to go over any land in order to get your logs from 20 into the river?

A. No, sir.

Q. Approximately how far is it from the head of tide water in the Wishkah River to where the east fork runs into the main river?

A. The forks is approximately the head of tide water.

Q. About how far would the timber from section 20 have to be put into the river from tide water?

A. Apparently about four miles.

Q. Is there any advantage aside from the actual cost of getting the logs to market in legging by railroad over logging in fresh water?

A. Oh, yes, getting them to market quicker.

Q. How much per thousand feet advantage is that?

W. H. Abel: Objection as too indefinite.

The Court: The question appears to be speculative. There is no definite data upon which he can fix that.

Q. Well, if there is a difference upon what data do you fix it?

A. First, the fact that to put logs in fresh water naturally they come in on freshets and the log market is glutted.

W. H. Abel: Objection unless limited to the east fork of the Wishkah River which is a driving stream.

Overruled.

A. Moreover the interest on your money for the logs while they are tied up might range from 15¢ to a dollar according to how far you brought them into this water.

Q. Is that regardless of the actual cost of getting the logs to market one way or the other?

A. Yes, sir.

Recross-examination.

By W. H. Abel:

Q. The large proportion of the logs that are sawed up on Grays Harbor come to market by the use of artificial freshets created
84 upon the logging streams tributary to Grays Harbor, is not that true?

A. I don't think it is.

Q. The output on the Wishkah River alone runs up to 100 millions a year, does it not?

A. It might some years.

Q. And all other logging operations upon the Wishkah River are a small proportion of that total output, I mean operations by rail?

A. You mean on all Grays Harbor or the Wishkah River?

Q. I am speaking of the Wishkah River.

A. Well, I would not say that it was.

Q. Do you know how often artificial freshets are created upon the east fork of the Wishkah River?

A. No, sir.

Q. Don't you know that the logs put into the east fork of the Wishkah River can come down to navigable water the same day as quickly as you can take them by rail?

A. They might.

E. G. HUNT, a witness recalled to the stand for and on behalf of the plaintiff, testified as follows:

Direct examination.

By J. B. Bridges:

Q. What is this map or plat that I hand you, Mr. Hunt?
A. That is a tracing of the topography of the vicinity of part of township 1908 from the county cruise.
Q. Does that show the creek or canyon running through the north half of 31?
A. Yes.

Mr. Bridges: I desire to offer that in evidence.

W. H. Abel: Objection, 1st, it is hearsay, 2nd, not the
85 best evidence, and 3rd, its correctness not shown.

Q. Is that substantially correct, Mr. Hunt?
A. It is simply a tracing right from the map which is compiled in the county engineer's office from the county cruiser's plat, showing the changes in the streams from the old original plat. They are compiling a mpa in the office of the county engineer showing the topography from the cruiser's notes rather than the original survey.

Mr. Bridges: I withdraw the offer.

Q. Mr. Hunt, what would be the approximate cost of extending this railroad, cost per mile on the average, from its present terminus through the northeast quarter of 31 and up to the south line of 30?

W. H. Abel: Objection as too indefinite. The witness has not made a survey and it is at the most a mere off-hand estimate.
The Court: Overruled. This witness has shown himself to be competent to make such an estimate.

Q. That is including the bridge and the construction and everything except the steel.

The Court: Eliminate the steel and ties.

A. The distance to reach into section 30 from the present terminus of the railroad would be approximately a mile and the cost in my opinion would exceed $30,000.
Q. What would the cost per mile be for the construction of the road aside from the steel and ties, along the proposed line from the present terminus?

W. H. Abel: Same objection.
Overruled.

A. From my observation of that route I would estimate about $5,000 a mile for building the main line and about $3,000 a mile for spurs.
Q. In building this mile into section 30 would there be any considerable bridge in order to build the road at the price you have spoken of?
86 A. Well, it would be a matter of determining whether to put in a heavy grade or that much higher trestle. It would be

a very high trestle anyway and of course to lower the trestle the more grade it would be to overcome to get out of that.

Cross-examination.

By W. H. Abel:

Q. If the logging road is built as proposed it would run up through section 29 and then a spur or branch west into 30, is that correct?
A. Yes.
Q. Would there be a canyon to cross to build that spur or branch from section 29 down into 30?
A. Yes.
Q. You are sure of that. Let us take your little map that you produced. Does that show a water course to cross?
A. No.
Q. Is there a water course crossing section 29, the southwest quarter?
A. It begins in 29 and runs across 30.
Q. You think that would not have to be crossed?
A. No. My idea is that the main line would go up through 29. A spur would be taken from the main line on the divide above the head of this stream and follow the spur west and a little south into 30.
Q. How much extra mileage would that involve?
A. Something like ¾ths of a mile spur track.
Q. Have you ever been on 30?
A. Yes.
Q. When?
A. I don't remember just when it was. I cruised a good part of that country in there.
Q. Have you ever been on 29?
A. Yes sir.
87 Q. When?
A. I can't say now, some time during the last 25 years.
Q. Did you prepare that blue print?
A. No sir.
Q. Is it substantially correct?
A. No sir.
Q. Does that show the water course upon section 30 correctly?
A. No sir.
Q. Where is the water course upon section 30?
A. It crosses the line between 30 and 31 about correct but instead of running down through 32.
Q. I mean up the other way up from the south line of 30 as bearing on whether or not there would be a canyon to be crossed?
A. That isn't correct.
Q. You swear that creek is not there?
A. It is not there in that shape.
Q. It isn't there at all?
A. It is there.

Q. Is there a deep canyon there?
A. According to the county cruiser's records there is not.
Q. That is what you are swearing by as to whether there would have to be a deep trestle to be built?
A. I would take the county cruiser's reports in preference to those.
Q. And you are taking these county cruiser's reports rather than your memory?
A. Yes sir.
Q. In other words, you don't remember?
A. No, I could not tell from my memory.

RAY JOHNSON, a witness recalled to the stand for and on behalf of plaintiff, testified as follows:

88 Direct examination.

By J. B. Bridges:

Q. After you had gotten your main line to about the middle of section 29 and built a spur out to get the timber in section 30, what is the character of the ground on which that spur would be built?
A. It would be on a ridge.
Q. Would there be any canyons?
A. No, sir, there would be no canyons at all.
Q. About what cost per mile to construct that branch?
A. Not over $3,000.
Q. About how long would that branch line be in order to get that timber in 30?
A. Not over 4,500 feet long.

Cross-examination.

By W. H. Abel:

Q. How far would you build the branch road in 30?
A. About 2,000 feet.
Q. That would not reach to the center of the section?
A. It would be very close because that section is short east and west.
Q. Well, what is the shortage?
A. Because it is along the township line.
Q. Well, how far from the west line of 29 do you propose to have the logging road?
A. You mean the main line?
Q. Well, if you call it the main line?
A. About the center, of 29.
Q. So then there would be half a mile to the section line and then 2,000 feet down into the section?
A. Pretty close to the center.
Q. That would be at least a mile in a straight line and it would run diagonally from 29 to 30?
A. No, sir, it would run from the center of 29 almost due west.

89 Q. You testified there are no water courses upon section 30?
A. Yes, there are water courses upon section 30.
Q. Are there any canyons?
A. There are none that the road would cross.
Q. What forties would the proposed road cross?
A. It would strike the center of 30 about the middle of the east side and would go almost due west and probably a little to the south.
Q. Due west to the center of 30. I thought you said you would not go to the center?
A. I said the center of the east side of 30.
Q. You have never had any experience in laying out logging road before, have you, Mr. Johnson?
A. No, sir.
Q. The stakes that you have set in the ground at present are not marked and are not numbered?
A. No, sir.
Q. There is nothing to distinguish grade stakes from station stakes. The stations are not numbered on the ground?
A. No sir.
Q. Was that for the purpose of avoiding letting the Grays Harbor Logging Co. and Mr. Boeing know anything about what those stakes signified, so that they could not check up?
A. No, sir there was not any intention like that whatever.
Q. You have not gotten that far along with your engineering studies where you put marks on stakes?
A. No, sir.

Redirect examination.

By Mr. Bridges:

Q. Is this the first piece of engineering you have done?
A. I have been working there for four years.
90 Q. Have you surveyed any branches or extensions of the main line of this road before?
A. Yes, sir, I have done all the surveying for the last four years.

Recross-examination.

By W. H. Abel:

Q. There has been hardly any railroad built for the company in that time?
A. Yes, we have been at it all the time.
Q. How much has been built?
A. Spurs and all about 25 miles.
Q. Those spurs have been taken up?
A. Yes, sir, most of them have been taken up.
Q. You wish the court to understand that section 30 is not broken up by canyons?
A. No, sir, it has canyons.

Q. Where are those canyons?

A. There is one crosses about 5 or 10 feet from the west of the southwest quarter and flows diagonally across and heads in 29 before it gets to the center of 29. There is also another canyon further over closer to the northern side of the section.

Q. There is a county road upon the north half of 32, is there not?

A. Yes sir.

Q. And there is a recently laid out county road, another one on the same half section?

A. Yes sir.

Q. At what grade does your proposed logging road intersect the county road?

A. Why, it crosses right at grade. The county road and the railroad have the same grade.

Q. There is a difference of five feet, is there not?

A. That is on the cut. We have a cut there also in the road.

Q. You have not received the consent of the board of commissioners of Chehalis County to cross?

91 A. I do not know.

Q. You say that your road will run through and cut and intersect at grade the county road?

A. Well, there is really not much of a cut there. It is only a three or four foot cut where they cross, so that by the time the dirt is taken out it will be practically level.

Plaintiff rests.

W. H. Abel: On behalf of each of the defendants, that is on behalf of the Grays Harbor Logging Co. and W. E. Boeing, I move the dismissal of this proceeding: First, because it is an admitted taking of private property for private purposes strictly; contrary to the 14th Amendment to the Federal Constitution; Second, the evidence does not show such a necessity for taking as would warrant the court in permitting condemnation of the defendant's property; Third, because it appears that this proposed road, if built, would cross the county road and no authority has been obtained to cross the county road, so it can't be said that this logging road could ever be built; Fourth, because it appears that by keeping upon its own property the petitioner can build its logging railroad; Fifth, because the authority of the A. F. Coats Logging Co. to subscribe for the capital stock of the Coats Fordney Logging Co. has not been shown and the legal effect thereof is that the capital stock of the Coats Fordney Logging Co. has not been fully lawfully subscribed.

C. H. Shutt, a witness called to the stand for and on behalf of the defendants, after being first duly sworn, testified as follows:

Direct examination.

By W. H. Abel:

Q. Where do you live, Mr. Shutt?

A. Aberdeen.

Q. Are you connected with the Grays Harbor Logging Co. and in what capacity?

A. I am manager.

92 Q. Does it own an undivided one-half interest in the property involved here, the northwest quarter of 32?

A. Yes sir.

Q. The owner of the other one-half interest is who?

A. W. E. Boeing.

Q. The other defendant in the case?

A. Yes sir.

Q. Are you familiar with sections 31 and 32 in that township?

A. Yes sir.

Q. How far are you from that?

A. We logged on 31 and the north half of 32. I have been on the grounds a good many times.

Q. How many years have you been intimately acquainted with 31 and the north half of 32?

A. Since about 1910.

Q. Are you acquainted with sections 29 and 30?

A. I am acquainted with section 30 but I have just been along the line in 29.

Q. Are you familiar with the surface of the northeast quarter of 31?

A. Yes.

Q. How does it compare with the surrounding country?

A. It is about the same. There is one small creek goes down close to the corner.

Q. What is this map now shown you?

A. That is a map of the northwest quarter of 32 and the northeast quarter of 31.

Q. Upon that map does the present terminus of the Coats Fordney Logging Co.'s railroad appear?

A. Yes, it is situated right here somewhere.

Q. (Map marked with cross.)

93 Q. What can you say as to the general correctness of the map with respect to showing the ridges, the gulches, and canyons and water courses upon the land involved here, the northwest of 32 and the northeast of 31?

A. It is nearly correct to my mind. This ridge probably is not as wide as it shows. That is in the corner.

Q. In the northeast quarter of the northeast quarter?

A. Yes.

Q. (Map offered in evidence and marked Defendant's Exhibit 2.)

Q. What do these dotted lines in section 31 represent?

A. These represent two routes we profess they can go through this way and just miss the corner and go up this creek.

Q. And the other one?

A. Goes a little further down, a little longer trestle here and this will put them into 30 on to a ridge.

Q. What can you say as to the number of canyons to be crossed, if the easterly of the alleged feasible routes was adopted through 31?

A. You would have this one canyon there.

Q. How much trest'e work would be required in that canyon?

Mr. Bridges: Objection because the witness does not appear to be qualified.

Q. What experience have you had with logging, Mr. Shutt?
A. I have been connected with the logging business for about 15 years.
Q. Logging by rail or by water?
A. By water.
Q. And is the Grays Harbor Logging Co. operating upon the east branch of the Wishkah River at this time?
A. It is.
Q. Have you ever had any experience with logging railroads?
A. No, not with logging railroads.

94 Q. Have you been over the northeast of 31, so that you can testify as to the extent of trestle work which would be required in building a road?
A. I think I could make an estimate the same as anyone.
Q. The same as Mr. Mack or Eugene France?
A. I think I could estimate as close as anyone.
Q. To what extent have you been over the northeast quarter of 31 with a view to determining the feasibility of building a road through there?
A. I have been there several times on that one route. I think they could get across that with a trestle not over 400 feet.

Mr. Bridges: Moves to strike the answer.
Motion sustained.

Q. How long a trestle would be required if the most westerly of the alleged feasible routes should be adopted?
A. About 800 feet.

Mr. Bridges: Objection because the witness has not shown that he is acquainted with logging railroads.
The Court: I think he has qualified himself probably as well as some of the others, who were allowed to testify on that question.

Q. How long would the trestle be?
A. Eight hundred feet for the most westerly one and about 400 feet for the easterly one.
Q. And with respect to the height of the trestle?
A. That would be about 90 to 100 feet.
Q. In each instance?
A. Yes.
Q. How well acquainted are you with section 30?
A. I have been on it several times.
Q. Have you examined that tract with reference to whether or not the timber thereon could be logged into the east branch of the Wishkah River?
A. I have.

95 Q. Have you logged similar land through the last fifteen years?
A. Yes sir.

Q. Been continuously engaged in logging such land?
A. Yes sir.
Q. How far is it from the section line on the west to the east branch of the Wishkah?
A. About 200 feet.
Q. And that 200 feet is owned by whom?
A. The Weyerhauser Timber Co.
Q. What can you say as to the feasibility of logging section 30 into the east branch of the Wishkah River?
A. I believe it can be done cheaper than by rail.
Q. Upon what do you base your opinion?
A. Being so close to slack water.
Q. Are artificial freshets created upon the east branch of the Wishkah?
A. There are.
Q. How often?
A. It depends on the number of logs put out, in the winter time about once a day.
Q. How speedily could logs be gotten to market if section 30 was logged into the east branch of the Wishkah?
A. Nearly every day.
Q. Would there be any more delay than there would be if the logs were hauled on the Coats Fordney railroad to their landing and then down by water?
A. No, sir, come to market just as quick.
Q. Does the Coats Fordney Logging Co. make use of the boom on the Wishkah River?
A. Yes sir.
Q. Their landing is above the boom?
A. Yes sir.
96 Q. Please state who are the persons interested in and controlling the management of the Wishkah Boom Co.?

Mr. Bridges: Objection as immaterial.
W. H. Abel: It is for the purpose of showing they have an easy way of logging the section.
The Court: Objection overruled. Exception.

A. I understand Mr. Johnson is president and Mr. Egerer, secretary.
Q. The Mr. Johnson who is secretary of the Coats Fordney Logging Co.?
A. That is what I understand.
Q. What are the boom rates upon the Wishkah River?
A. Boomage is 40¢. They charge extra for towage. Driving is another——
Q. Does the Coats Fordney Co. have that charge to pay?
A. I understand so.
Q. The same as you who log into the east branch of the Wishkah?
A. Yes sir.
Q. What is the driving rate upon the east fork?
A. I do not know what it is on the main river. Mine is in tide water. They float down.

Q. What is the driving rate upon the east fork of the Wishkah?
A. It varies from 40 to 60¢ depending on which point they are put in at.
Q. Is it a public service corporation operating on the east fork of the river?
A. It is.
Q. What is the name?
A. East Fork Driving Co.
Q. Who is managing that company?
A. I am.
Q. Would there be any occasion for delay so that the interest upon the investment in logs would be a factor in logging upon the east fork in logging section 30?
A. No delay at all.

97 Q. Do you know about how much timber there is upon section 30? Have you had it cruised?
A. Yes sir, we had a cruiser make a cruise of it. He made fifteen millions.
Q. In the ordinary course of logging operations of the Coats Fordney Logging Co., how long would it take to put in that fifteen millions?
A. Two to two and one-half months.

Mr. Bridges: Objection as immaterial.

Q. Going to section 20 have you ever had that cruised?
A. No, never had section 20 cruised.
Q. Admitting that it has 25 or 20 millions of merchantable timber thereon, how could that be logged?
A. That could be logged into an upper pond the East Fork Driving Co. has on section 18.
Q. What is this map?
A. Township plat of 19-8 West.
Q. Does it show the location of the east fork of the Wishkah?
A. Part of it.
Q. The part contiguous to section 20?
A. Yes sir.

(Map offered for purposes of illustration.)
Mr. Bridges: No objection for purposes of illustration.
We do not admit its correctness.
Marked Defendant's Exhibit (3).

Q. Will you indicate about where the pond is?

(Map marked by a line on the line between sections 18 and 19,

Q. What would be the length of haul in logging operations in handling timber on 20 into the east fork?
A. About one and one-half mile long the longest haul.

98 Q. As logging is conducted in western Washington what can you say as to whether that is a long haul or short haul or medium haul?
A. A medium haul.

Q. What can you say as to the cost of handling the timber on 20 into the east fork of the Wishkah as compared to handling it by rail?

A. I am satisfied it can be done by water cheaper.

Q. Why so?

A. It would be expensive to put a railroad in there.

Q. What can you say about the wouthwest quarter of section 8 as to the feasibility of logging it into the pond on the Wishkah?

A. It can be logged that way.

Q. What is the length of haul from the farthest point on the southwest of 8?

A. Not over half a mile. It cuts the corner here.

Q. Then the east fork of the river runs right through that quarter?

A. Yes.

Q. As to whether it could be logged more cheaply into the east fork of the river than by building a railroad and handling it that way?

A. It can be logged more cheaply in this pond than by rail.

Q. Coming now to the southwest quarter of section 10 what is the easiest and best way and cheapest way to log that?

A. Build a skid road right to this pond here. There is a pond here.

Q. A pond in section 4 on the east fork?

A. Yes sir.

Q. Navigable water there?

A. Yes sir.

Q. Doing that at this time?

A. Yes sir.

Q. Has the Grays Harbor Logging Co. got timber con-
99 tiguous to the southwest quarter of section 10?

A. Yes, sir, it has the other three quarters of ten.

Q. How does the company contemplate logging it?

Mr. Bridges: Objection as immaterial.

Overruled.

A. It is going to build a skid road to the pond down to section 10 near the middle.

Q. And the longest haul from the southwest quarter of ten would be what?

A. About 1¾ miles.

Q. What can you say as to whether that is a prohibitive distance when considering the feasibility and cost and such?

A. We do not consider it as such.

Q. From your years of experience in the logging business what can you say as to whether logging operations are frequently conducted where timber situate as this timber is, two miles from navigable water, is put into such rivers?

A. You can haul two miles. You can haul over two miles.

Mr. Bridges: Objection.

Q. Not what your company has done but what is done generally?
A. It is done quite often.
Q. With respect to access to the river, to go to the east fork from section 30 you say there would be a 200 feet strip to be crossed belonging to the Weyerhauser Timber Co.?
A. Yes sir.
Q. With respect to logging section 20 what lands would have to be crossed?
A. You would have to cross 19.
Q. Section 19 is owned by whom?
A. The Weyerhauser Timber Co.
Q. To log the southwest quarter of 8, what land would have to be crossed, if any?
A. None.
100 Q. To log the Southwest quarter of ten?
A. The section.
Q. A Weyerhauser section?
A. Yes sir.
Q. You heard the testimony of Mr. Stout, the manager of the Coats Fordney Logging Co., that he could always get a right of way from the Weyerhauser Timber Co.?

Mr. Bridges: Objection. He said that he had not had any trouble, not that he could or would.

Q. Do you know what the policy of the Weyerhauser Timber Co. is in that regard?

Mr. Bridges: Objection as immaterial.
Sustained.

Q. As to whether or not J. W. Fordney, one of the members of the Coats Fordney Logging Co. and one of the stockholders, is associated in business with the Weyerhauser Timber Co. in the Twin Falls Logging Co.

Mr. Bridges: Objection. Overruled.

A. I understand Mr. Fordney is associated with them in the Twin Falls Logging Co. at Yacolt.
Q. From your experience of fifteen years what can you say as to the entire feasibility of logging all of the timber upon the lands mentioned in the petition here into the east fork of the Wishkah River?
A. It can be done. I consider it preferable.
Q. In your fifteen years, did you say you had had fifteen years?
A. Right along.
Q. Where has the logging been carried on?
A. On Grays Harbor.
Q. With respect to the Wishkah River, how many years' experience have you had?
A. Five years.
Q. As to whether or not loggers operating under those
101 conditions on the Wishkah River can compete in the markets of Grays Harbor in the handling of logs with logging railroads?

Mr. Bridges: Objection.
Overruled. Exception.

A. We have no trouble at all in getting our logs to market. The fact is we get them to market too fast. We maintain these ponds principally for storage. We are storing them now. We have more in the boom than we can sell.

Q. As to what is the rate?

A. From the farthest pond. We have three ponds. They charge 10¢ for putting them through the dam, each dam.

Q. As to whether those rates are reasonable or confiscatory, whether logging can be carried on profitably?

A. I consider those reasonable rates for that stream, for the limited amount of timber there is there.

Q. As to whether the northwest quarter of section 32 has been recently opened up by the building of the county road through it and is that land available for any special uses?

A. I think it would make good farming land. We had buyers for it but did not care to sell it.

Mr. Bridges: Move to strike the answer as it bears on the question of damages.
Sustained.

Cross-examination.

By J. B. Bridges:

Q. How many dams have you on the east fork?
A. Three.
Q. Are they splash dams?
A. Yes sir.
Q. All of them?
A. Yes sir. One of them is located near the line between 18 and 19.
Q. That is the middle one?
A. Yes.

102 (Cross made on Exhibit C showing location of dam.)

Q. Now, where is your upper dam?
A. Near the south line of section 4.

(Cross made and word "dam" written on Exhibit C.)

Q. Now, you say you have another dam?
A. Just about the middle of section 36-19-9.
Q. How much of a pond does your upper dam make?
A. We have had as high as four thousand logs at one time.
Q. How long?
A. About three-fourths of a mile.
Q. How much of a pond does your middle dam make?
A. It will hold at least fifteen million.
Q. About how long?
A. Over a mile.
Q. How wide?

A. It will average 200 feet for a mile.
Q. About the pond for your lower dam?
A. That isn't quite as large. That will hold ten or twelve million feet.
Q. How far up the river does it extend?
A. It extends to the south line of 25.
Q. Does that show the east fork about right?
A. Yes, it floats logs to about that point.
Q. That would be about the center of section 31, extended westerly?
A. No, this is north of 31. We have slack water up at about that point in 25.
Q. Up to about the southeast quarter of 25 you have slack water. Who owns section 19?
A. The Weyerhauser Timber Co.
103 Q. Who owns section 18?
A. The Grays Harbor Logging Co.
Q. Then in order to log section 20 into the river you would have to go through some of the Grays Harbor Logging Co. land?
A. Not necessarily.
Q. Why not?
A. You could go through section 19 which is a shorter section and strike the creek.
Q. How long a haul would that make?
A. A little over ¾ of a mile through the timber.
Q. It would make an average haul of about 1½ miles?
A. Yes, on the average.
Q. To put it up here into section 17 would be an average haul of about what?
A. About the same.
Q. Of about 1½ miles. The longest haul of about two miles in each instance?
A. Here is a mile from the corner post of the west side of 17 or half a mile to the north line of 20 and then a mile across section 20.
Q. Then your charge in operating this river, this east fork, logs put into the dam, in dam No. 1, the lower dam, is how much?
A. Forty cents.
Q. Logs put into the middle, the pond of the middle dam, how much?
A. Fifty cents.
Q. And how much in the upper dam?
A. Sixty cents.
Q. That would take the logs how far. Does tide water come up above the forks?
A. Yes.
Q. You would have a down haul largely, would you not, in logging from 30 into the river. That is not acceptable as a rule in logging?
104 A. That is what we are looking for.
Q. Down hill logging?

A. On a roader, yes sir, always.
Q. How would be your haul from 20 if you hauled through 19?
A. Down grade.
Q. Suppose you were logging into the river from 17?
A. I could not tell you.
Q. Have you been on 19 and know whether there would be a down haul?
A. Yes, I have been there.
Q. I thought you said you had not been on 19?
A. I have been on that part there.
Q. Have you been in the center of the section?
A. I have been near the center.
Q. Have you been near the southeast quarter?
A. Yes sir.
Q. And the northeast?
A. I have been on all quarters but I have not been on the line. I have not been on 20.
Q. How large a stream is this east fork of the river through the ordinary summer season, say, June, July, August and September?
A. How much water coming down?
Q. Yes.
A. We have splashed that lower dam every five days right through the summer.
Q. How about the upper dam?
A. This is the first season we have had the upper dam in. About once a week.
Q. And how about the middle dam?
A. We have not splashed that very much because we did not have many logs to come down. We didn't wish to work it.
Q. You don't mean to say, take the upper dam, that these
105 logs all come to market, all come to tide water?
A. They have to come to the pond below and then up.
Q. The logs coming through the upper dam have got to come through the pond of the lower dam?
A. Yes sir.
Q. How many will come on the average splash? What per cent of the logs sluiced through the upper dam?
A. You want to know how many we put out at a sluicing?
Q. No, what per cent will come down at one splash?
A. Practically all.
Q. What proportion of the logs that are sluiced through the middle dam will come down to the lower dam?
A. All.
Q. What proportion of the logs sluiced through the lower dam will come into tide water?
A. All of them.
Q. So that all of your logs will come through at one splash?
A. Nearly so. We shut the gates as soon as we are through splashing. That lets the last logs ground and leaves them right in the channel and the next splash picks them right up and sends them down.

Q. You have logs on the bars?
A. We have logs on the bars all the time but the next splash takes them down.
Q. There are a lot of them?
A. No sir.
Q. There are some?
A. There are a few scattered ones everywhere but the next splash picks them right up.
Q. I will ask you whether or not there are not a lot of logs, a good many of them, been there for six months or more?
A. There are no logs have been there for six months to my knowledge.

106 Q. You say you have been in the logging business for 15 years, how were you engaged in the logging business prior to your connection with this company?
A. I was associated with the C. E. Burrows Co.
Q. Were you engaged in the logging or were you not book-keeper?
A. I had the logging end to look after.
Q. You had nothing to do with the actual logging, putting logs into the water or driving?
A. I had nothing to do with putting the logs into the water or driving them down the stream.
Q. So that as a practical logger your experience is limited to the last four or five years?
A. Yes, probably my experience is limited to the four or five years in the logging business being right in the harness, you might say.
Q. Have your dams any of them washed out?
A. We had one dam go out some years ago.
Q. How long ago?
A. I think it was 1910.
Q. Which dam was that?
A. The lower one.
Q. How long did it take you to rebuild?
A. Six or eight weeks.
Q. Have you had any trouble with that dam since then?
A. No sir.
Q. How about the dams above?
A. No trouble with any of them.
Q. Now, how far below the forks or the head of tide water does the Coats Fordney Logging Co. dump its logs into tide water?
A. That is how far up river or in a straight line?
Q. Well, up river approximately. I do not care for exact——
A. I guess 3½ miles.

107 Q. In the neighborhood of half way down from the mouth of the river to the head of tide water?
A. No, I think not.
Q. Nearly half way?
A. I think you call it 12 miles by river.
Q. Ten. At any rate it is some 3 or 4 miles down the river in tide water from the head of tide water?

A. Yes sir.
Q. Now, Mr. Shutt, take what you call your easterly proposed right of way through the northeast quarter of section 31, how much of a trestle would there be there?
A. Four hundred feet.
Q. And about how high?
A. One hundred.
Q. What grade of your road would you have to reach that?
A. Practically no grade at all.
Q. From what point?
A. From the place here where you come around the side hill.
Q. Going off down here somewhere near this quarter corner?
A. Down a little further.
Q. Not far from where the road terminates. And your east proposed right of way would have no grade or practically none?
A. No.
Q. How do you know that?
A. A man can fix it as he wants it.
Q. Did you make any survey?
A. No, no surveys at all.
Q. Have you been over that particular land?
A. I have been over every foot.
—. Who made this survey?
A. Mr. Haymond.
Q. Were you with him when he made it?
A. No, sir.

Q. How do you know that on that land there would be
198 practically no grade and a bridge 400 feet long and 100 feet high?

A. You have a side hill to work on, go up or down for your grade and go straight across that.
Q. You would not get into your timber then by that. You would not get into section 30?
A. Yes.
Q. You go to section 29.
W. H. Abel: You cross 30.
Q. Do you think it is practicable to log all of the timber in 30 down to that corner?
A. You can follow this creek up here. This puts you in on this line of 30.
Q. It doesn't according to the map you have got here?
A. The map isn't quite right.
Q. So that you have not any personal knowledge of any matters you are testifying about on that line?
A. I went over it the same as the rest.
Q. Did you go over it as a surveyor or with aneroids to find out what the grade would be?
A. Not with a surveyor.
Q. Take your most westerly proposed route what do you know about that?
A. I don't know much about that.
Q. You have not been over it?

A. I have been over it.
Q. You don't know of your own knowledge what the grades would be or how high the bridge or trestle would be?
A. I didn't survey it.
—. When you testified that the trestle would be so long, you are taking some other person's word for it?
A. I have no personal knowledge of exactly what it would be. I have been over it the same as anybody else.
Q. You don't know anything about what the grade would
109 be in order to get the bridge 800 feet long?
A. What I have heard testified here probably 1½%.
Q. That is all you know about it?
A. Yes.
Q. This northwest quarter of 32 is logged off land?
A. Yes.
Q. That portion of it where we are seeking our right of way has been logged off?
A. Yes.

Redirect examination:

By W. H. Abel: Was it logged by rail or water.
A. We logged it by water.
Q. Into the east fork?
A. Into the east fork of the Wishkah.
Q. That is further away than section 30 naturally?
A. Yes sir.

THOMAS HAYMOND. a witness called to the stand for and on behalf of defendants, after being first duly sworn, testified as follows:

Direct examination.

By W. H. Abel:

Q. State your name and residence?
A. Thomas Haymond. Aberdeen.
Q. Your profession?
A. Civil engineer.
Q. Ever have any experience in railroad surveying or construction work?
A. Yes sir.
Q. What experience have you had?
A. Oh, I have been connected with three or four of the transcontinental railroads and put in a logging railroad or two for some of the mill companies.
110 Q. In your transcontinental railroad experience was that in railroad engineering and construction?
A. Yes sir, location.
Q. With respect to logging railroads what experience have you had?
A. I have had considerable with the Slade Lumber Co. the Hewitt Logging Co. the Wilson Co.

Q. How many years in all have you had in logging railroad location work?

A. Oh, about five years.

Q. Have you recently been over the land involved in this case, the northeast quarter of section 31 and the northwest quarter of section 32-19-8?

A. Yes sir.

Q. What did you do up there, Mr. Haymond?

A. I went up and took a recognizance on the three quarters and took a few levels.

Q. Did you see Mr. Ray Johnson of the Coats Fordney Logging Co. and see his profile map of the proposed road?

A. No, sir, not until afterward.

Q. Do you know where the present northern terminus of the Coats Fordney Co.'s road is?

A. Yes sir.

Q. Did you make an examination of the northeast quarter of 31 to determine whether or not it was feasible to build a logging railroad across that into section 30 and thence northerly into these other lands?

A. I made a recognizance to see if I could get into 30. I did not observe much beyond 30.

Q. This Defendant's Exhibit 2 did you draw it?

A. Yes sir.

Q. Is it correct?

A. It is reasonably correct.

111 Q. Is it drawn from data obtained in the field?

A. Chiefly.

Q. These two dotted lines indicate what?

A. Routes whereby a road might be built other than theirs.

Q. Take the most easterly of those routes and tell the court about the topography of the land for the building of a logging railroad there.

A. This terminus is up on a hill. It is right on the top and this route shows going to the side (Place marked "high hill") and make your cuts and fills and make a long trestle in crossing 30.

Q. How long a trestle would there be at the most easterly of the alleged feasible routes?

A. That depends on how much of a cut. Something in the neighborhood of 360 or 400 feet. (Map marked "300 to 400" at place indicated.)

Q. About what would be the height of the trestle?

A. One hundred feet. (Map marked "100").

Q. Is this a hill beyond that trestle?

A. Yes sir.

Q. How much of a cut through that hill?

A. Thirty or thirty-five feet cut. That is a very sharp ridge.

Q. How wide or narrow?

A. Well, it is nearly wide enough on the top for a skid road and it is quite steep. I should say probably 100 or 125 feet.

Q. How would that cut of 30 or 35 feet compare to the cut on the proposed route?

A. I don't think you would get anything over 35.

Q. About what would be the depth of the cut at the other hill on the south side of the trestle on the proposed easterly route?

A. The center line probably 25 or 30 feet in places.

112 Q. And what would the grade of the road be on that proposed easterly feasible route?

A. That would depend entirely on what you wanted to get out depend on the amount of timber.

Q. Suppose the amount of timber was approximately fifty millions feet and was to be hauled out at the rate of six or eight millions a month?

A. If your track was temporary, it would make a difference in the cost of the road.

Q. Just explain say for ordinary logging railroad purposes what is supposed to be the ordinary grade to haul logs up?

A. Well, spurs frequently run up to 7 or 8 per cent. Main lines occasionally 3 or 3½ per cent.

Q. Take the logging roads on Grays Harbor and give some instances of grades?

A. On the Coats Fordney they have probably 4½% grade.

Q. On the spur?

A. That is a pull.

Q. Have to pull the load up that way. And their main line grades, adverse grades, are what?

A. Oh, probably 2½%.

Q. Now, then if the alleged feasible route through their own lands, the easterly one, was adopted, how would the grades compare with their main line grades elsewhere?

A. Why, it would compare favorably, not with their real main line, but with their spur line. Their spur line would haul perhaps twice fifty million, one hundred million feet.

Q. Let us take the westerly alleged feasible route, what can you say about the cuts and fills along the line of that proposed route?

A. The fills are very favorable along that, but the trestle is a bad one.

Q. How long a trestle would that have to be?

A. About 850 feet.

113 Q. How about the cuts?

A. The cuts will run 18 to 25 feet. (Map marked.)

Q. So that would be about on the ground level?

A. Yes sir.

Q. How would it be over to the north line?

A. Oh, 16 or 18 foot cut.

Q. Would either of these proposed trestles on the proposed routes be on a curve?

A. No, sir, you can make them go up on a tangent.

Q. As to the grade of the westerly route?

A. A little better than 2%. (Map marked.)

Q. What did you say the grade of the other was?

A. Practically the same.
Q. From your experience as a railroad locating and construction engineer, can you state what the probable cost would be of the easterly proposed route across 31.
A. Oh, $7,000 or $8,000.
Q. And on the other proposed possible route?
A. Would be about $1,500 more.
Q. That would be say $9,500?
A. No, about $1,200.
Q. Does that include steel and all?
A. Yes sir.
Q. And the length of those proposed possible routes?
A. In the neighborhood of a mile.
Q. As a matter of feasibility is there any necessity for leaving their own lands and going upon section 32?

Mr. Bridges: Objection to the form of the question, saying leaving our own lands.
Mr. Abel: Don't you claim title to 31?
Mr. Bridges: No.
Mr. Abel: You claim you have a right of way?
Mr. Bridges: No.
114 The Court: I have received that impression somewhere. I have been listening to this testimony right along with the belief that you owned section 31.

Cross-examination.

By J. B. Bridges:

Q. Your trestle on your most easterly land would probably be——

The Court: Since it has developed that is not your property it is all immaterial about that land.
W. H. Abel: It has only developed from a statement of counsel. We have the sworn statement of the manager in the record on the subject.
The Court: I don't know about that. If you have a right of way generally over the section then this testimony is material. If you simply have a right of way on the line you are proceeding on, then it is immaterial.
W. H. Abel: We are content with the state of the record upon the matter.
Mr. Bridges: I would like to call Mr. Johnson on that part of our case in chief.
W. H. Abel: Objection to any alteration of the testimony now.
The Court: Objection overruled.

B. F. JOHNSON, a witness called to the stand for and on behalf of plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By J. B. Bridges:

Q. Mr. Johnson, who owns section 31?
A. The Weyerhauser Timber Co.
Q. What if any arrangements have you with the Weyerhauser people concerning any right of way through section 31?
A. We have a verbal agreement with Mr. Weyerhauser that when we get our railroad built on that line as designated on the Weyerhauser map that we are to get a deed for the right of way.
115 After the railroad is built we are to agree upon the price. That is the way. That is the only way.
Q. Does that agreement affect the north half of 31?
A. It affects where the road goes across, that is where the survey is made by Mr. Martin.
Q. Is that all of the agreement or arrangement you have with the Weyerhauser Timber Co.?
A. Yes sir.
Q. And that is a verbal agreement?
A. Yes sir.
Q. There is nothing in writing?
A. No, sir.

Cross-examination.

By W. H. Abel:

Q. How did the Coats Fordney Co. get their road into 31 at all?
A. By the permission of Mr. Long of the Weyerhauser Timber Co.
Q. When?
A. I think it was a year ago last May.
Q. Who had the negotiations on the subject?
A. Mr. Fordney and myself.
Q. You merely requested to go across 31 and you were told to do it?
A. He told us we could go across there and lay out a plan we had agreed on and after the road was finished then we would pay him for the right of way. The reason we did that — because we thought we might vary a little one way or the other and did not know how much we might take.
Q. At that time your survey was not made?
A. Yes sir.
Q. When?
A. Three years ago.
Q. By whom?
A. By my son Raymond. That is, he made one survey and Mr. Martin made another survey for the Weyerhauser people a little before that.

Q. Who was to decide the definite location of the road?
116 A. We were.
Q. And by that you mean the Coats Fordney Logging Co.?
A. Yes sir.
Q. Give the conversation upon the subject after which you entered upon section 31?
A. I don't kr.ow. It is quite a long work.
Q. I know. Give it.
A. I guess I have already given it.
Q. What was said by you and what was said by him?
A. We asked him to go into section 31.
Q. Where was the road at that time?
A. That was in section 12.
Q. Now what did you say to him?
A. We told him we were desirous of going through there.
Q. Where?
A. Going through 31, what we are talking about.
Q. 31-19-8?
A. I suppose. Well, he says, "That is all right. Go through there." To get that timber out in the north, we had a lot of timber in there at that time and we told him also we wanted to build a head-quarters there and didn't know how much land we would take and he says, "Go right ahead and when the road is finished we will agree to give you a right of way through there on a *pirc* price we can agree on.
Q. The relations of the Coats Fordney Logging Co. and the Weyerhauser Timber Co. are close, friendly and confidential?
A. We are friendly, yes.
Q. The Coats Fordney Logging Co. has never had any difficulty in getting a right of way that it has wanted through any of the Weyerhauser Timber Co.'s lands?
117 A. That is the first we have wanted. We did not have any trouble.
Q. You were told to go ahead?
A. Yes sir.
Q. The Coats Fordney Logging Co. was to decide where it would build through section 31?
A. Yes sir.
Q. There has been no payment of the price yet?
A. No sir.
Q. The price has not yet been fixed?
A. No sir.
Q. It just depends on where the railroad is built and the amount of land taken?
A. The amount of land taken for head-quarters.
Q. You don't think you will have any difficulty in settling with the Weyerhauser Timber Co. when you finally get together?
A. I don't think so. I have no reason to think so.

W. H. Abel: I submit, your Honor, they have proved that they have a right of way through section 31.

The Court: They have a right to go on this line that is surveyed, that is practically on the line of the Martin survey, but that is all according to his statement.

Q. Mr. Johnson, the map had not been made at that time?
A. Which map do you have reference to?
Q. Your son's map?
A. Well, I don't know. I think it had.
Q. And stakes had not yet been set?
A. The preliminary survey had been made up as far as section 16.
Q. No stakes were set?
A. The preliminary stakes were set three years ago last June, where we anticipated going.

118 Mr. Bridges: Motion to strike the testimony of the witnesses concerning these other routes over section 31 as immaterial.

The Court: Motion sustained. Exception.

W. H. Abel: We offer to show by the witnesses, Mike Parrott, C. W. Blackwell, Cy McLean, Jesse McCash, Andrew Droski, Rodney Maxwell and Archie Murray and Frank Noble that each of them are experienced loggers by railroad, except Rodney Maxwell, who is a construction engineer, and that it is entirely feasible to cross section 31 at reasonable cost in the building of a logging railroad to run north to sections 20 and 30 and the southwest quarter of section 10 and the southwest quarter of section, all in 19-8.

Mr. Bridges: It is possible that if they can prove that the other routes shown on this map are more acceptable and better routes, then it is possible that we might have to go that way. I don't concede that.

The Court: That does not affect it unless you have the right to go through where they are suggesting but you have no right to cross that section except where you are proposing to cross it.

W. H. Abel: Exception.

C. W. BLACKWELL, a witness called to the stand for and on behalf of the defendants, after being first duly sworn, testified as follows:

Direct examination.

By W. H. Abel:

Q. State your name, age and residence.
A. C W. Blackwell. Sixty-four years old. Residence, Aberdeen.
Q. Have you ever been engaged in the logging business?
A. Yes sir.
Q. For how many years?
A. Forty.

119 Q. Are you acquainted with the east fork of the Wishkah River?
A. Yes sir.
Q. How long have you been acquainted with the lands contiguous to that river?

A. Twenty-six years.
Q. Are you acquainted with section 20, section 30, the southwest quarter of 10 and southwest quarter of 8, township 19-8?
A. Yes.
Q. With respect to the east fork of the Wishkah River how do those lands lie for logging purposes?
A. Very well.
Q. Have you ever logged up the east fork of the Wishkah River?
A. No.
Q. Where has your logging principally been?
A. On the main river, on the west fork.
Q. You know the character and quality of the timber upon the lands just mentioned, do you?
A. Yes.
Q. How is the quality?
A. First class timber.
Q. As to the size of the logs, how does the timber run in size?
A. Good size.
Q. How does it compare with other similar lands, that is timber in western Washington?
A. Oh, it is a good average.
Q. What can you say as to whether or not those lands which have been described to you could be logged into the east fork of the Wishkah River?
A. Yes.

Mr. Bridges: Motion to strike the answer and object to the question for the reason that the testimony shows already that in order to
120 put any of this timber into the river we would have to haul over or across lands which we do not own and have no right to cross.
Overruled. Exception.

Q. How long a haul is usual and feasible in logging operations into such rivers as the east fork of the Wishkah River?

Mr. Bridges: I desire to make a general objection to the introduction of testimony concerning logging into the river for the reason that the testimony shows that in order to log into the river we would have to haul across lands we do not own.
The Court: Yes. I will take his testimony. There is one quarter section that does not apply to.
Mr. Bridges: Exception, particularly as it affects all the land except one quarter.

A. That depends on the grade you can get.
Q. You know these lands here, Mr. Blackwell, probably all of them. The question then is applied to these particular lands.
A. You take land where you start right on the bank of the river you can go back two miles.
Q. Have you often logged across country two miles?
A. I never have but I have seen others do it.
Q. That is often done say in the Grays Harbor country?

A. Yes, it has been done.
Q. What can you say as to the relative cost of hauling that distance and logging that way as compared with loading on cars and hauling out by railroad?

Mr. Bridges: Objection as the witness has not shown himself qualified.

Q. Have you had any experience in logging by railroad?
A. No.
Q. Have you ever examined into the subject to determine what the cost of logging by railroad is?
A. I have looked it over many times but there have been such improvements since I was around railroads that I would not
121 be competent to testify.

Cross-examination.

By J. B. Bridges:

Q. As I understand your testimony so far it is merely to this extent that this timber could be logged into the east fork of the Wishkah River?
A. Yes.
Q. You have not testified as to the cost of so doing?
A. No.
Q. A two or one-and one-half haul is rather an unusual haul?
A. Yes, getting pretty well back.

CY MCLEAN, a witness called to the stand for and on behalf of defendants, after being first duly sworn, testified as follows:

Direct examination.

By W. H. Abel:

Q. Where do you live?
A. Hoquiam, Wash.
Q. Your occupation?
A. Work in the woods.
Q. Logging, you mean?
A. Yes.
Q. How long have you followed logging as an occupation?
A. About eleven years in Washington.
Q. Have you logged by rail and by water?
A. Yes sir.
Q. How many years' experience have you had with logging railroads?
A. About ten years.
Q. And how large camps have you run, I mean as to the output per month?
A. Oh, four or five millions a month.
Q. What companies have you worked for in Washington?
A. I worked for the Northwestern Lumber Co. for 6 years.

Q. You run camp for them?

122 A. Oversee for them. Lytle Logging Co., O K Logging Co. and Hackett & McLean.

Q. Were those all water loggings?

A. No, sir.

Q. Any of them who did not own railroads?

A. Hackett & McLean did not use a railroad.

Q. You were with the Northwestern Lumber Co. as superintendent for six years?

A. Yes sir.

Q. And how long with the Lytle Logging Co.?

A. For the Lytle Co. about one and one-half years.

Q. What can you say as to the feasibility of logging a distance of say a mile or 1½ miles into water?

A. I would not think half a mile or a mile would make much difference. Where you have got machinery you can haul logs as cheap a mile or a mile and one-half as you can a mile with machinery.

Q. You have looked at these lands?

A. Yes sir. Never cruised them.

Q. Assuming they contain fifty million feet more or less what can you say as to whether they can be logged into the east fork of the Wishkah River as cheaply as by rail?

A. Yes, I should judge they can be logged as cheap. I never was in 8 or 9 or 10. I was in 30.

Mr. Bridges: I understand the same objection will go through this testimony.

The Court: Yes.

Cross-examination.

By J. B. Bridges:

Q. Section 20 which would be on the average a haul of somethink like a mile and one-half, that is a fairly long haul, isn't it?

A. No, a one-and one-half haul ain't a long haul. After

123 you get 4,000, you have got to have two donkeys each * * * a difference of 1,000 or 2,000 in each donkey don't count much.

Q. You have got the extra expense of your road and your extra donkey?

A. Oh yes.

Q. It takes more men to haul one and one-half or two miles?

A. Yes, you have got to have more donkeys.

Q. You have got to have more skid road, wire, etc.?

A. Yes sir.

Q. So that it does cost more?

A. Oh yes.

Q. It is probably double the cost to go 1½ as to go 1 mile?

A. No, about one-third.

Q. It would be more material?

A. Yes, one-third more.

Q. You say you think this timber in 30 could be put into the river as cheap as it could be logged by rail?
A. Yes.
Q. You would not say that with reference to section 20?
A. No, I have never been back in 20. I don't know how that is there to get a road.
Q. You understand that the Coats Fordney Co. have a main road of railroad running from down in tide water up to pretty close to this *this* land and they are operating that?
A. Yes.
Q. If you owned this railroad, Mr. McLean, and you also owned this timber, if you were in the position of the Coats Fordney Logging Co. would you not think fit to use the railroad rather than to put that timber in section 30 into the river?
A. Not if I just had 30.
Q. Suppose you owned 20 and 30?
124 A. It is different. For that one section I would not as it is right on the bank of the river. You could log it into the river cheaper.
Q. There is considerable advantage in getting the logs to market isn't there, by logging by road than by water?

W. H. Abel: Objection unless it is limited to a river that has dams.
The Court: You are familiar with this situation?

A. That is what I thought. This place alone in the shape these forks are fixed up and the river is in, they could get logs as quick there as on the car.
Q. They can get some of the logs?
A. They can get all of them.
Q. That is different from all other streams?
A. They handle them different.
Q. It must be an excellent logging stream?
A. No, it ain't.
Q. And yet all the logs come down in twenty-four hours?
A. It is only just a little piece there. It is only 3 miles or so down to tide water. It ain't like the Humptulips.
Q. There are gravel bars and sand bars?
A. No.
Q. Any time the stream is overflowed your logs are carried beyond the banks?
A. No.
Q. Aren't there logs there now?
A. No.
Q. How do you know?
A. I was up there Sunday.
Q. How far did you go?
A. To the first dam.
125 Q. How long since you have been on this [illegible] above the lower dam?

A. Oh, it is four or five years. Those upper dams in fact was built since I was there.
Q. So that you do not know the condition of this stream above the lower dam?
A. That is all pond from one dam to the other.
Q. How far up this east fork did you go?
A. I went up to the first dam.
Q. What do you mean by the first dam?
A. The first dam on the river.
Q. The first dam going up the river?
A. Yes, I didn't go up and come down the river.
Q. You don't know anything about the river above the first dam?
A. Yes, I do. I could see up there half a mile or three quarters.
Q. When you were working for the Lytle Company, Mr. McLean, in what capacity were you working?
A. Camp foreman.
Q. Of all the camps or just one camp?
A. Just one camp.
Q. Were you logging by rail?
A. No, sir, by skid road into the water.
Q. What other company did you work for?
A. The O. K.
Q. Were you logging by rail?
A. No, sir.
Q. What other company?
A. The Northwest Lumber Co.
Q. Were you logging by rail?
A. Yes sir.
Q. Did you log also by skid road?
A. Yes sir.
Q. About how long did you log by rail for the Northwest Lumber Co.?
A. Five years.
126 Q. Were you in charge of one camp there?
A. Three camps.
Q. What were your duties in charge of the camp?
A. Superintend laying out the roads.
Q. See the logs were put on the roads on the cars, etc.?
A. Yes sir.
Q. You didn't, however, come in contact with the actual cost or expense of transporting those logs down to market?
A. Yes sir, I got a statement every month.
Q. Of hauling the logs?
A. Yes sir.
Q. Did you know anything about the cost of construction of the roads?
A. Yes sir.

Redirect examination.

By W. H. Abel:

Q. Are you acquainted with section 20? You have testified as

to the conditions of 30 and that it is cheaper to log by water. Have you been over 20?

A. No sir.

Q. Do you testify as to the southwest quarter of 10 or 8?

A. No, I was never up there.

Q. So your testimony relates to section 30 and your judgment is that it is cheaper to put it into the water than to build a railroad and take it out that way?

A. Yes sir.

JESSIE MCCASH, a witness called to the stand for and on behalf of the defendants, after being first duly sworn, testified as follows:

Direct examination.

By W. H. Abel:

Q. Where do you live, Mr. McCash?

A. I live in Hoquiam.

127 Q. What is your occupation?

A. Logger.

Q. How many years' experience have you had logging?

A. Sixteen.

Q. And in actual running the logging camp how long?

A. Seven years.

Q. And what companies have you worked for in running camp?

A. I have run camp for myself, the C. E. Burrows Co. and the Grays Harbor Logging Co.

Q. Are you running camp for the Grays Harbor Logging Co. at this time?

A. Yes sir.

Q. Where are you logging?

A. Section 7 in this township.

Q. How many years have you been with the Grays Harbor Logging Co.?

A. Three and one-half years.

Q. And in logging operations in this township how long a haul have you had? What has been the longest haul?

Mr. Bridges: Objection as irrelevant, incompetent and immaterial. Overruled.

A. About two and one-half. A little over two and one-half miles.

Q. What can you say as to the cost of hauling that distance as to wether it was feasible as a logging proposition to do that?

A. The reports show that the camp made more money than it ever did before or since.

Q. It was done at a profit?

A. Yes sir.

Q. Coming to section 30, are you acquainted with section 30 of that township?

A. Yes sir.

Q. What is the cheapest and most feasible way of logging timber off that section under the conditions existing up there now?

128 A. Put it into the water on the east branch.

Q. Have you ever logged by railroad?

A. I have worked in a camp but not having charge.

Q. With reference to section 20 what is the cheapest, most feasible way of logging that?

Mr. Bridges: Objection because the witness has not shown himself qualified.

Overruled. Exception.

A. I am not competent to say. I have never examined 20 very much. I have been on the west side. The west side of it would go into the river. It would be practicable but the rest of it I would not say.

Q. Now with respect to the southwest quarter of 8, what can you say as to the most feasible, practicable way of logging that?

A. That could not be got any other way except into the river.

Q. And the southwest quarter of 10?

A. It lies tributary to the river, to the east branch.

Q. At what cost could the southwest quarter of 10 be logged per thousand feet into the east fork of the Wishkah River?

A. About $3.75 a thousand.

Q. How does that compare in cost with ordinary logging operations on lands situate at some distance from the river, or from any river?

A. About an average.

Q. Do you know the character of the stream of the east fork of the Wishkah?

A. Yes sir.

Q. How is it for driving purposes?

A. It is the best driving stream I ever worked on.

Q. What experience have you had with driving streams?

A. I have drove most of the rivers in western Washington.

Q. How many dams upon the river?

A. Three.

129 Q. How frequently can logs be driven down the east fork and gotten to market?

A. The logs we put in one day comes to the boom the next this time of the year.

Q. And in the summer time how speedy is it?

A. The average dry season we sluice about once a week.

Q. Have you had actual charge of the driving operations upon this river?

A. Yes sir.

Q. For how long?

A. Most all the time I have been there, about 3½ years.

Q. Is there any appreciable loss of logs from logs hanging up, getting over the banks and the like?

A. No sir.

Q. How are the banks?
A. They are good.

Cross-examination.

By J. B. Bridges:

Q. As to section 30 you think that could be logged into the river successfully?
A. Yes sir.
Q. At about what price?
A. About $2.75 a thousand.
Q. That would be to put it into the pond?
A. Yes sir.
Q. And section 20 you don't know enough about to testify?
A. I would not say.
Q. The southwest quarter of 10 you think would cost about $3.75 to put into the water?
A. About that.
Q. The driving charge would be 60¢.
A. Yes sir.

130 Q. Now, don't you think that if you had a railroad into this section 30, a railroad fully built and in operation and with all equipment and you owned it and dumped logs where this railroad dumps them way down in tide water that you could put logs into market cheaper by the railroad than by putting them into this stream?
A. I do not.
Q. You don't know anything about that?
A. Yes sir.
Q. You have not logged by railroad?
A. Yes sir.
Q. Where?
A. For Clemons.
Q. How long?
A. I was there one winter.
Q. How many camps were you running?
A. I wasn't running any. I wasn't running camp.
Q. What were you doing?
A. I was tending a donkey.
Q. Well, then you base your answer to my previous question on the fact that you ran a donkey for a logging railroad?
A. No, sir.
Q. What else?
A. I can log them by water just as cheap as by putting them into the landing by skid road.
Q. Don't you have to have more skid roads and a longer haul?
A. Sometimes I do.
Q. If you have a railroad landing you don't have skid roads?
A. Yes sir.
Q. Not very much in the way of skid roads in a railroad operation?

A. Not ordinarily.

131 Q. So that you have a large saving there in the question of construction and maintenance of skid roads?

A. Ordinarily, yes.

Q. You have no information about section 20?

A. No sir.

Q. And as to the southwest quarter of section 10, that would cost to put into the river $3.75 and the driving would be 60¢ making a cost of $4.35 a thousand to get into tide water?

A. That is just my judgment, a rough estimate.

FRANK NOBLE, a witness called to the stand for and on behalf of the defendants, after being first duly sworn upon oath, testified as follows:

Direct examination.

By W. H. Abel:

Q. Mr. Noble, you live at Hoquiam?

A. Yes sir.

Q. And by occupation you are what?

A. Timber cruiser.

Q. Have you ever run a logging camp?

A. Yes sir.

Q. What experience have you had in operating logging camps?

A. I ran camp four years for the Mack Logging Co.

Q. A railroad proposition?

A. Yes sir.

Q. Did you log into the Chehalis River?

A. To the Northern Pacific Railroad.

Mr. Bridges: How long ago?

A. I can't tell you exactly. I think about 12 or 13 years ago.

Q. Have you had any other experience in railroad logging?

A. No.

Q. Have you ever worked in camps?

A. I worked in the woods here for 28 years.

132 Q. Are you acquainted with section 20-19-8?

A. Yes.

Q. Did you ever cruise that?

A. I did.

Q. Those are your original notes, are they?

A. Yes.

Q. How much timber did you find upon that section?

A. There is about 16 million.

Q. When did you cruise it?

A. In March, 1910.

Q. Did you in cruising that timber consider the cheapest and most feasible way of logging it?

A. Yes.

Q. What is the cheapest and most feasible way to log section 20?

A. Into the east fork of the Wishkah River.

Q. How far distant from the river?

A. The corner is right on the bank of the river within 200 feet, I think.

Q. You are thinking of section 30, are you not?

A. Yes, 30 is what I mean. My cruise is 18 million on 20.

Q. Your testimony so far relates to section 30?

A. Yes sir.

Q. Did you cruise section 20 also?

A. Yes.

Q. At about the same time?

A. No, that was about a year later.

Q. Did you in cruising section 20 consider and determine the cheapest and most feasible way of logging it?

A. Why, it can be logged either way. If the railroad is built it can be logged by railroad or it can be logged by skid road to the Wishkah River.

133 Q. Considering it as a logging proposition tributary to the east fork of the Wishkah River how good a logging show is it?

A. It lays about a mile from the river across section 19, a short section.

Q. Is that distance one that is usual in logging operations?

A. Yes.

Q. Can you give the court an idea of the cost per thousand feet of logging that section into the Wishkah River?

A. In my judgment it would be somewheres around $4.

Q. In your experience logging by rail after a railroad is built if the railroad is say half a mile distant, what can you say as to the cost of logging operations?

Mr. Bridges: Objection. I think this witness has not shown himself competent to testify to that.

Overruled.

A. Well, that depends on where the railroad is.

Q. We will take Plaintiff's Exhibit "C" suppose the railroad is built upon the dotted line indicated through section 20, suppose the railroad was built and all that expense met, at what expense could logging operations be carried on and the logs be taken down and dumped into the landing?

A. I think about the same, about $4. a thousand feet.

Q. Are logging operations by rail more costly than by water where there is a good river?

A. Water is the cheapest way to handle logs.

Q. Did you cruise the southwest of 8?

A. I cruised a part of 8. I have not the notes of 8 but I know it lays right on the river.

Q. Now, which would be the cheapest way of logging the southwest quarter of 8?

A. The river.

Q. And do you know the southwest of 10?

A. I cruised three quarters in 10.

134 Q. Was the southwest one of them?

A. I think not.

Q. You cruised for the Grays Harbor Logging Co.?
A. Yes.
Q. Could the southwest quarter of ten be feasibly logged into the east fork of the Wishkah?
A. Yes.
Q. How does the cost compare with logging by rail, suppose that a railroad was actually constructed and in operation in section 9 or was a quarter of a mile distant?
A. There would not be much difference.

Cross-examination.

By J. B. Bridges:

Q. Suppose you were in the position of the Coats Fordney Logging Co., Mr. Noble, they have built, paid for and have in operation this railroad up to within a mile or two of section 30 and you had your choice of extending your road up to cut this timber in section 30 and in section 20 and those other two quarter sections up above about which you have testified, I say you have your choice to cut those by railroad or to put them into this water, don't you think you would take them out by railroad?
A. I can't answer that direct. There is two pieces of that that can be put in a great deal cheaper by water.
Q. Section 30 I suppose you have in mind and the southwest of 3?
A. Yes.
Q. But take it as a body of timber, those four pieces, including 20 and the southwest of 10.
A. In my judgment it can be put cheaper into the water than to be logged by railroad from where your railroad is to extend the railroad.
Q. There is some advantage, is there not, in putting your logs down to market by railroad, not having any hanging up and having
135 delays in getting them down to water?
A. There is advantages on both sides.
Q. What are the advantages on one side or the other?
A. The railroad can get supplies better. They are easier to get your logs down every day. There is advantages in the river on account of fire and it is a cheaper way of handling logs by water than by railroad.
Q. If the cost is the same you would as a matter of fact under those circumstances take them by railroad?
A. Yes, if the cost was the same, the railroad would have that advantage.

W. H. Abel: Objection because it assumes that one cannot get logs down this river when they want them.
Mr. Bridges: I asked him with reference to this stream.

Q. As a matter of fact logs which are put into the stream quite often get destroyed by fire, do they not?
A. They are apt to. There is not as much damage that way as by fire on the railroad.

Q. You mean the railroad itself. I mean while the logs are in transportation?

W. H. Abel: Only if they fail to drive for 6 or 7 months.

Q. Did not the Mack Logging Co., for whom you worked, originally dump their logs into the Chehalis River and afterwards abandon that and haul them down the Northern Pacific Railroad because it was cheaper?

A. Not while I worked for them.

W. H. Abel: Objection as immaterial.

Sustained.

Q. When you speak of the relative cheapness of getting logs to market by water or by railroad you take into consideration the charge of the driving company for its service?

A. Yes, I figured that to offset the operation of the railroad.

136 Q. Have you taken that into consideration in making your estimates?

A. Yes sir.

Q. Your idea is that as to at least section 30 and the southwest quarter of section 8 that this company would better afford to let their whole works be idle and meanwhile put that timber into the river and they could make more money that way?

A. I say it could be logged considerably cheaper that way.

Q. Answer the other question, the question I put?

A. Yes, I do.

Q. But that answer would not apply to section 30, would it, and the southwest quarter of section 10?

A. Well, I think they can be logged cheaper into the water, build a skid road cheaper to the water than to extend this railroad in two pieces.

Redirect examination.

By W. H. Abel:

Q. Mr. Noble if artificial freshets on the east fork can be made from once a day in the wet season to every five or seven days in the dry season would there be any difficulty in getting the logs promptly to market?

A. Why no if they would drive right to tide water.

Q. How many miles of a drive is it on this east fork down to tide water? Is it a short drive?

A. Yes sir.

Q. Is it diagonally across the township?

A. That river runs nearly north and south, a little west of south. Of course, the river isn't straight.

Q. How far is it from the upper dam?

A. I should say it was 7 or 8 miles.

Q. And take the Humptulips how many miles are logs driven on it?

137 A. About thirty miles, I think.

Q. And the main Wishkah River would be as much as thirty miles?

A. I can't say exactly. I don't think it is that far down to tide water.

Recross-examination.

By J. B. Bridges:

Q. On the Wishkah River and the Humptulips River there are logs out on the bank and the bars, been there 10 to 15 years or 20 years, are there not, Mr. Noble, a long while anyway?
A. Oh, yes, some logs.
Q. Probably never will get to market?
A. I don't know.

Rebuttal.

E. G. HUNT, a witness recalled to the stand for and on behalf of plaintiff, testified as follows:

Direct examination.

By J. B. Bridges:

Q. Mr. Hunt, you are acquainted with the east fork of this river?
A. Yes sir.
Q. And the operations on it?
A. Yes.
Q. Taking into consideration that the petitioner has its railroad built, I will ask you whether it would be more or less economical for them to take this timber on section 30, 20, the southwest quarter of 8 and the southwest quarter of 10 out by railroad into tide water at their landing or to undertake to put it down the river?

W. H. Abel: Objection because the witness is not shown to have had any experience with logging or the cost of logging.
The Court: You had better qualify him.

Q. State your experience with reference to such matters in the building and operation of roads and cost of handling logs?
138 A. My experience has been for about 25 years with doing work in different capacities for logging companies. I haven't had any experience in the running of logging camps and a very small experience in working in the woods but my knowledge is more from observation than anything else. I have been connected with logging companies in different ways.
Q. Has your experience as an engineer in doing work upon rivers and logging streams brought you in contact with the relative cost of logging in those two ways?
A. Yes.
Q. Now you may answer my question.
A. There are certain parts of those sections that my opinion is it would be cheaper to put in the water. Take them as a whole eliminating the southwest quarter of section 8, which I am not certain now it is feasible to log by railroad, the balance of the timber in my opinion as a whole would be cheaper logged on the cars,

although there are certain parts of section 30 that would undoubtedly be more economical to put in the water, if it was not taken altogether.

Cross-examination.

By W. H. Abel:

Q. You have never operated a logging camp?
A. No.
Q. You have never worked in a logging camp?
A. Yes.
Q. When?
A. In 1896.
Q. Did you ever log by water yourself?
A. I never logged myself.
Q. You worked in the woods when logging operations were carried on?
A. Yes sir.
Q. Did you ever participate in logging by rail?
A. Not, except locating roads.
139 Q. Do you know what it costs to operate a logging railroad?
A. Different costs of different roads.
Q. You have never had any experience with that subject. You have merely helped to locate railroads?
A. My observation is all. I have been working at that work a good many years.
Q. Just watching trains go by with logs on?
A. Somewhat more than that. I have watched them bring the logs in to the trains, watched them fall the trees, buck them.
Q. Do you know what the cost of building skid roads is?
A. Yes sir.
Q. What per mile?
A. It varies.
Q. How much would it cost to build this railroad up from its present terminus?
A. Something over $5,000. a mile.
Q. You have never been up that right of way?
A. I have been over every foot of that right of way.
Q. When?
A. At various times in the last 25 years.
Q. What is the ordinary cost per yard of a skid road?
A. Well, skid roads cost from $1,000. to $5,000. per mile.
Q. Have you ever investigated any of this land to determine the cost of skid roads upon it?
A. No.
Q. You don't know how many miles of skid road there would be?
A. Oh, I have an idea. Part of section 8 or of section 30 that half a mile of skid road would log.
Q. That is a short section, only ¾ of a mile long?
A. I don't say one skid road but a half mile skid road would log quite a lot.

140 Q. What would be the cost of that half a mile of skid road?
A. I can't say without looking it up. I don't know where the skid road would be built.
Q. You have never investigated any of these lands with reference to what the cost of building skid roads would be?
A. No, not particularly.
Q. Or even generally?
A. Yes, generally I have.

B. F. JOHNSON, a witness recalled to the stand for and on behalf of plaintiff, testified as follows:

Direct examination.

By J. B. Bridges:

Q. Does your company own any lands in section 25-19-9?
A. No, we do not.
Q. In section 19 have you any ownership of that?
A. No, sir.
Q. Or in section 17 have you any ownership?
A. No.
Q. Or in section 18?
A. No.
Q. Sections 17 and 18 and 25 belong to the Weyerhauser Timber Co.?
A. Yes sir.
Q. Have you any rights in the Weyerhauser Timber Co. or anybody else to get your logs over their lands to the river?
A. No.

Cross-examination.

By W. H. Abel:

Q. You don't know whether you will be able to cross any of those lands with your railroad?
A. No.
Q. So you may never be able to build your railroad anyway?
141 A. We anticipate we can have the right.
Q. You don't know whether you can get across the county road?
A. I have been across once. They have never held any loggers up yet and I don't suppose they would make an example with us.
Q. That would depend whether you could cross on grade?
A. We would have to do that of course.

CLYDE MARTIN, a witness recalled to the stand for and on behalf of plaintiff, testified as follows:

Direct examination.

By J. B. Bridges:

Q. Have you been on section 20 involved here?
A. I have been on the east half.
Q. Have you been on or around section 30?
A. I have been around three sides of it.
Q. How about that in ten?
A. I have been on that southwest quarter.
Q. In your work for the past seeveral years for the Weyerhauser Timber Co. has it been your duty to make investigations of the cheapest and most economical and best way of getting their timber to market?
A. Yes sir.
Q. Now, taking into consideration that the Coats Fordney Logging Co. has its railroad built and in operation up to the point where it has timber, what would be the most economical way of bringing their timber logged in section 30 and section 20 and 8 and 10 to market?
A. Well, if you take the timber altogether——

W. H. Abel: Objection to taking the timber altogether because it is not in fact altogether.

The Court: You may state it both ways. It all belongs to them and they have got to get it out.

142 A. To illustrate the way I look at it. I believe that the timber in 20 and 10 could come out much more cheaply by railroad. Say build a railroad in there, say there is 50 million feet, say a railroad costs $50,000. That would be $1. a thousand if we brought all the timber by railroad. Well now part of that timber is a little long haul for a railroad, a little hard to get. If we only brought 25 million of that by railroad, the cost of handling would be $2. a thousand, so as a rule we figure because of greater tonnage we can afford to spend 50¢ may be 75¢ to pick out timber in certain places to bring it out on the railroad to reduce the cost of this timber that must come out on the road. I should think that would be the best way to handle the entire body of timber.

Cross-examination.

By W. H. Abel:

Q. Do you wish the court to understand then that section 30 can be logged cheaper by water?
A. Not entirely. There is some parts of section 30 I believe could be brought out by railroad cheaper if the railroad was in there.
Q. Now, the cost of $50,000. for the railroad is for the main line?
A. That is merely speculative.
Q. I understand. You have not even made any estimate?

A. That was simply an illustration.

Q. Then you don't know what the main line of railroad would cost to be extended up so as to get the timber on the southwest of 10?

A. I put an estimate on that three years ago, four years ago.

Q. What was your estimate then?

A. That the completed railroad would cost not to exceed $10,000. per mile.

Q. And how many miles?

A. That was for the main line reaching up to the north line of 20.

Q. That would be how many miles?

A. Approximately 15 miles.

143 Q. How many miles would it be to extend the main line from the present terminus up so that the southwest quarter of 10 could be logged?

A. Why, it would take probably 2¼ or 2½ miles.

Q. Why the present terminus is down at the south line of the township?

A. Yes.

Q. And their line would extend nearly across the township. Would it go in a straigh- line?

A. Very nearly. It goes in a northeasterly direction.

Q. And only 2½ miles. Let us take your map.

A. I was mistaken in the distance.

Q. To get up into 10 would be how many miles?

A. Probably 3½ miles at least.

Q. It would be nearer six would it not. It would be three miles east and four miles north would it not?

A. The main line would not extend that far east. It only goes about to the line.

Q. Let us have in a general way your present estimate of the distance?

A. Well, I would think it would probably be around 4 or 5 miles.

Q. That is assuming it would be a straight line?

A. Going in a northeasterly direction. Very nearly a straight line.

Q. So then the probable cost of such a main line would be $50,000?

A. Probably around that.

Q. And when that main line was built the nearest point of the railroad to section 30 would be at least half a mile, would it not?

A. Yes, at least that much.

Q. That is an air line?

A. Yes sir.

Q. You heard the testimony of Ray Johnson yesterday that it would be nearly a mile of branch line that would have to be built?

144 A. It would take nearly two or 2½ from here to the intersection of 30.

Q. Do you mean to say that even if this main line was built and

came to about the center of 29 as indicated on your map that any part of 30 could be logged as cheaply by rail as by water?

A. That depends. If you take section 30 by itself some of that could be brought out as cheaply by rail as by water. That skid road could be built as cheap from there as to water.

Q. To build a skid road it would be only about half a mile as against more than that by railroad?

A. It would be the same yarding distance by railroad.

Q. I want to call your attention to this that in section 30 the river is very near the west line whereas if this railroad was built as proposed it would be half a mile from the east line. Do you mean to say it could be logged as cheaply by rail?

A. I said the east part of the section could be logged as cheaply by railroad.

Q. Do you mean that the Coats Fordney Logging Co. could log the southwest quarter of 8 as cheaply by railroad?

A. I didn't say that.

Q. They do not need a railroad as to the southwest of 8 at all?

A. Not by itself.

Q. They have no necessity for a railway as to that quarter section they have a public highway there now?

A. Yes.

Q. Have you made an estimate of the number of miles of branch railroad that would be required to connect the main line with the timber in section 30, section 20, the northwest of 8 and the northwest of 10?

A. No, I have made no estimates on branch lines at all.

Redirect examination.

By J. B. Bridges:

Q. Do you say that a part of section 30 could be logged
145 as cheap by this railroad as put into the river?

A. I believe so.

Q. And a part can be logged cheaper by the river than put on the railroad?

A. Yes.

Q. How about 20?

A. I believe 20 would come much cheaper by railroad.

Q. And how about the southwest of 10?

A. I believe that would come more cheaply by railroad.

Q. Now considering then that the railroad in your opinion should be built up for the purpose of getting 20, the additional expense of getting 30 would be the branch built out to connect as far as the railroad goes?

A. Yes.

Recross-examination.

By W. H. Abel:

Q. Could you give the court an estimate of the average cost per mile of skid road?

A. We find it varies greatly the same as railroads. The cost in my acquaintance with them runs from $2,000. to $10,000 a mile.
Q. You made this map?
A. Yes.
Q. According to your map the distance to the east fork of the Wishkah River from the nearest point of section 20 is somewhat less than half a mile?
A. Yes, but you can't always go in at those points.
Q. Do you know what point the skid road would reach the river?
A. No.
Q. So you can't tell what the cost of building the skid road into section 20 or how long the haul would be?
A. No.
Q. And the same is true of the southwest quarter of 10?
146 A. I can tell a little more about that because I have been over the ground.
Q. The railroad would be nearer the river in that instance?
A. Unquestionably would.

Redirect examination.

By J. B. Bridges:

Q. You spoke of the main line costing not to exceed $10,000. a mile extending up north. Does that include the ties and steel?
A. That was fully equipped and ballasted.
Q. So that there would be a salvage there, so to speak, out of that on the ties, at any rate on the rails and iron?
A. Yes, there is a certain salvage on main line road, I suppose.
Q. Suppose this railroad was built two or three miles for the purpose of removing the timber and it took one year or two or three years to remove, what would be the relative value of the steel?
A. The steel depreciates very little. In an operation of five years I doubt if there would be a depreciation of steel more than 10% or 15%.
Q. So that the steel would be worth practically what it was when put down?
A. Very nearly.

Recross-examination.

By W. H. Abel:

Q. In your experience have you ever know- of a main line railroad of five or five and one-half miles being built to reach fifty million feet of timber when there was a navigable logging water as near as the east fork of the Wishkah River. If so, give the instance?
A. I don't know of any instance where a railroad has been built to get out such a small patch of timber entirely?

147 Redirect examination.

By J. B. Bridges:

Q. Do you know of any instance where a railroad like this yas extended three to four or five miles for the purpose of getting fifty millions?

A. Not for fifty. I know where that extension has been made for a few million more than fifty, say seventy-five millions.

W. H. Abel: Objection unless the conditions were the same as to access to water.

B. F. JOHNSON, a witness recalled to the stand for and on behalf of the plaintiff, testified as follows:

Direct examination.

By J. B. Bridges:

Q. Mr. Johnson, I wish you would tell the court in your own way what you consider about the advisability of logging this timber into the water or by railroad and give your reasons, etc.

A. Well, if I was logging section 30 by itself without any other timber beyond there I think that I could log section 30 into the river just as cheaply as I could log it by railroad, providing we did not have a railroad there, but section 20 we could not, as the railroad in section will run into the section, making a short haul. It will be a short haul and cheap logs in section 20. Logging section 30 into the water you have got to figure on an expense of 40¢ a thousand for driving. You have also got to figure on an expense of a few cents a thousand feet for the delay that you would be subjected to by putting it into the fresh water owing to operation of dams, hanging up on the bars, etc. which is a consideration.

Q. How about the southwest quarter of 10?

A. Well, section 10 necessarily has to go out by rail as we have no right there through to the river. We would have to cross other people's lands, other than the Weyerhauser Timber Co.'s and we would be up against the same proposition we are now.

148 Q. Suppose you extended your line up for the purpose of getting 20 then under those circumstances how should section 30 be logged?

A. It should be logged by rail then if we get into 20.

Q. Take this southwest quarter of 8, what have you got to say about that?

A. Well, the southwest of 8 and the southeast of 8 is practically owned by the same company. That is Mr. Fordney owns the southeast. It would naturally come we would own the half section.

W. H. Abel: Objection as not within the issues as to the southeast of 8.

Mr. Bridges: It is true that under this condemnation we probably could take but the southwest of section 8. As to whether we own other timber, say the southeast or some other timber in the neigh-

borhood, will affect the question very materially whether the southwest will come out by railroad or by water.

The Court: That is a business proposition for the company of course but we could not consider it in this action.

Q. Suppose you have the right to remove, or obtain the right to remove the timber from the southeast quarter of section 8 or any other timber immediately adjoining the southwest quarter, how would that affect the advisability of removing the southwest quarter of section 8 by water or by railroad?

W. H. Abel: Objection as immaterial.

Sustained. Exception.

Q. State the facts concerning the removal of the southwest quarter of section 8 down by railroad or by water?

A. Well, we would have to condemn more land other than what we are looking for at present and if the expense was too great and too much land to condemn we would have to dispose of this southwest of 8 or log it into the river. It all depends on what we can do when we get that far.

Q. On your obtaining additional right of way?

A. Yes.

149 Cross-examination.

By W. H. Abel:

Q. If the main line railroad as proposed was extended across the lands of the defendants and across section 29 immediately north the railroad would be about the center of the section, would it not? It would therefore be half a mile from the main railroad to the nearest point of section 30?

A. Yes sir.

Q. Whereas by water the east ford is only about 200 feet from the nearest point of the west line of section 30?

A. Yes sir.

Q. And you want the court to understand then that that timber on section 30 can be removed as cheaply half a mile to the nearest point on the land as 200 feet, do you?

A. You would have to build half a mile I am sure but on taking the other way you have two skid roads.

Q. Why two skid roads if you have only one branch road?

A. Because you are taking it from two canyons. There are two canyons. You have got to go down two ridges, sir.

Q. Are those shown on the map?

A. I don't known whether they are or not.

Q. Have you been over section 30?

A. Yes, sir, been over section 30.

(Indicates on map.)

Q. Why can't you cross the creek?

A. Because the canyon is too deep.

Q. How far up does that canyon extend?

A. Comes up here.

Q. I suppose when you put your branch road you have to cross the canyon and the creek?

A. Oh, no, you come down here.

Q. There is a canyon to the south?

A. Your canyon is deeper the further you get towards the river.

Q. Suppose you did have to build two skid roads the two skid roads would not be as long as the branch railroad?

A. Oh, yes you have got to build pretty close to half a mile.

Q. And you have to build over half a mile of railroad?

A. Pretty near half a mile of skid road.

W. B. MACK, a witness recalled to the stand for and on behalf of plaintiff, testified as follows:

Direct examination.

By J. B. Bridges:

Q. I would like to ask whether this timber in sections 30 and 20 and the southwest quarter of 10 and 8 could be logged more economically by the Coats Fordney Logging Co. down their railroad into tide water or down to the east fork of the Wishkah River?

W. H. Abel: Objection because the witness has not shown any acquaintance with 30, 20 or southwest quarter of 8 or 10.

A. I have no acquaintance with any of the land with the possible exception of 30 and that was just judging from the topographical map and from what part of the section I saw that it was possible to build down through 29 on those ridges and to log up hill very economically and very quickly.

Q. Take section 30.

A. You can log up hill much cheaper than you can down. The way those ridges run I believe you can build a railroad fully as cheap as you can build a skid road and you have got no long haul. And that you could get out more logs to the railroad than I believe you could to the skid road. That is the cars would take them away on the railroad while you would perhaps be hindered on your skid road with natural troubles connected with all skid roads. That you could handle them more expeditiously on a railroad than on a skid road. That it would be logged at least $1. a thousand cheaper by railroad than by water.

Cross-examination.

By W. H. Abel:

Q. How much a thousand?

A. I would not go into details.

Q. When were you on 20?

A. I wasn't on 20. I was up in 32 looking on the ridges.

Q. How many miles away from 30?

A. Say half a mile.

Q. And you saw 30 at all?
A. The section corner was pointed out there.
Q. You didn't see the section corner?
A. It wasn't on it.
Q. You were a mile away?
A. Half a mile.
Q. Did you see any witness trees?
A. No, I didn't go to the corner. We were looking across a deep gully that was some 250 feet deep.

W. H. Abel: Motion to strike the testimony because it is too conjectural. The witness was never on the land.
The Court: Motion denied.
Exception.

W. L. STOUT, recalled to the stand for and on behalf of plaintiff, testified as follows:

Direct examination.

By J. B. Bridges:

Q. W. H. Abel: Have you a cruise of section 30? (Cruise produced.) We would like to offer in evidence their own cruiser's report, showing only one creek.
The Court: Mr. Johnson's testimony was that there was only one creek and two ridges, one on either side.
Mr. Bridges: No objection except that the report is valuable
152 property. (Copy of map to be substituted instead of original.)

Q. Take section 30, Mr. Stout, where is the most of the timber on that section?
A. Lower section 30.
Q. The timber that you have been recently logging near the terminus of your landing I will ask you what has been the cost of logging your timber by railroad and putting it down into tide water?

W. H. Abel: Objection as not rebuttal and the conditions are not shown to be similar.
Over-ruled. Exception.

A. Taking a month's logs, fairly good month's logs, $4.05.
Q. That put your logs from the tree into tide water?
A. Yes.

Cross-examination.

By W. H. Abel:

Q. That didn't include your over-head charge, the cost of your main line?
A. Yes, sir.
Q. How much did you allow per thousand on that for over-head expenses? I am asking you for memory now.

The Court: He must use that.

W. H. Abel: I objectio to his testifying from that. The witness has now produced a small typewritten slip from which he is permitted to testify without proof of correctness.

Redirect examination.

By J. B. Bridges:

Q. Are the figures on that correct?

W. H. Abel: Objection as not rebuttal.
Overruled.

A. This slip is taken from the regular monthly record and is cut off for the reason that it shows matters not connected with this case.

Q. Is that a correct statement of the cost during the month of August of transportation?

153 A. I am satisfied that it is.

Recross-examination.

By W. H. Abel:

Q. This is a copy of something?

A. It is an hectograph copy of an original.

Q. Where is the original?

A. We sent the original east.

Q. Please put that in your pocket and tell the court if you have any independent knowledge as manager of the Coats Fordney Logging Co. of the over-head charge per thousand feet.

A. I don't presume to carry definitely such figures as these in my head.

Q. You don't know.

A. I am satisfied that I know because I have been at it long enough to know what they ought to be.

Q. What are your regular monthly expenses?

A. My regular monthly cost is $4.05. I don't try to remember anything more than that.

Q. Did you compile those figures?

A. Those are compiled from our records.

Q. Where are the records?

A. In our office, in Aberdeen.

Q. How much do you charge to overhead expense?

A. A depreciation of 4.7 cents per thousand feet.

Q. That is only depreciation. Is that all you can tell us about overhead expense?

A. Well, under the head of over-head expense would come office expense, taxes, insurance, employees' expense, right- of ways, cruisers' expense.

Q. How much for the original investment for the main line? Is that shown there?

154 A. It is under the head of depreciation.

Q. You mean to tell this court that the cost per thousand

feet of building the main line railroad is listed under depreciation of 4.5 cents a thousand feet?

A. That is what I figure it.

Q. Isn't it true that in these items which aggregate $4.05 the original cost of the railroad isn't included at all?

A. No, that isn't true.

Q. Then, if you have 50 million feet to log the railroad would only cost 4.5 cents a thousand feet?

A. I haven't intimated that.

Q. So far as your logging operations in the past are concerned that is all it has cost?

A. That is what it cost in the month of August and that is a fairly representative month.

Q. Did you build any railroad in the month of August?

A. No, but we are including what we previously built.

Q. There is no cost of building, only depreciation but the original cost of the railroad is not included at all?

A. I don't understand you.

Redirect examination.

By J. B. Bridges:

Q. What items have you included in getting at your cost?

A. Transportation of logs, depreciation on the railroad, depreciation on skid roads and landings, office expense, discount and interest, taxes, insurance, employees' insurance, that is the industrial insurance, cruisers' expense, right- of ways, falling and bucking and falling and loading and general expense. That is every item.

Q. What is the item of depreciation? What is that intended to cover?

A. It is the item of depreciation on our investment.

155 Q. At the rate that you have run your depreciation for that month how long would it take you to wipe your road off, your investment off?

W. H. Abel: Does that show what the road originally cost? That isn't figured. Objection.

Over-ruled. Exception.

A. That is depreciation on the railroad on a basis of ten years.

Q. What do you mean by that actually?

A. We mean to have the road paid for in ten years.

Recross-examination.

By W. H. Abel:

Q. Then your original investment in the railroad bears the same relation to the 4.5 cents that ten years bears to the month of August, bears to one month.

A. That would be 120.

Q. Is that true?

A. Approximately.

W. H. Abel: Offer slip as exhibit to contradict the witness. Marked Defendants' Exhibit (4).

Q. In the month of August what was the cost of falling and bucking?

A. About 46 cents.

Q. How many sets of fallers and buckers to each yarder?

The Court: We are spending too much time on that detail.

W. H. Abel: If they will concede that this slip only shows operating expenses.

The Court: I see very plainly how they are figuring that and they say that depreciation for that month, just for that period of time, for that amount of logs, amounts to so much on the original cost.

RAY JOHNSON, recalled to the stand for and on behalf of plaintiffs, testified as follows:

Direct examination.

By J. B. Bridges:

156 Q. You are acquainted with the location of the timber on this section 30, are you?

A. Yes sir.

Q. Where is the most of it?

A. There is about three-fifths of it on the ridge on the south side of it.

Q. What proportion of it is in the southeast quarter of 30?

A. The biggest part of the timber is right in the southeast quarter.

Q. How about the northeast quarter?

A. It is rather scattered. Along this creek there is quite a little. Upon the top of the ridge here.

Q. Where is here?

A. In the northeast quarter. There is considerable right near the corner in the northwest quarter.

Q. Take it as a whole how is the timber on the west half of the section?

A. That is scattered. In some parts there is nothing.

Cross-examination.

By W. H. Abel:

Q. The northwest quarter of 30 is the heaviest timbered of all, isn't it?

A. No, I don't consider it so.

Q. Have you cruised it?

A. I have been through it.

C. H. SHUTT, recalled to the stand for and on behalf of defendants, after being first duly sworn testified as follows:

Direct examination.

By W. H. Abel:

Q. At one time did the Grays Harbor Logging Co. have a contract to purchase the timber on section 30?

A. We had one drawn up and signed it up and made the
157 first payment and the other party failed to sign it for reasons I don't know.

Q. Did you at that time have the cruise made by Noble as he testified yesterday?

A. Yes sir.

Q. Is this the original statement made by him?

A. Yes sir.

Q. Is it correct?

A. I consider it correct.

W. H. Abel: We offer the cruise in evidence.
(Marked Defendants' Exhibit 5).

Q. Now, Mr. Shutt, have you ever examined section 30 yourself to determine what would have to be done in order to log it, the best and most feasible way?

A. I have.

Q. Please show from the cruiser's report where that can be most cheaply logged?

A. We had purchased that timber and was going to put a bridge across the creek (Map marked) haul into this pond right down the creek.

Q. Is that feasible?

A. Yes sir.

Q. Have you known of instances where that has been done?

A. Yes sir.

Q. By what company?

A. The Warren Company did haul a number of logs that way, for 10¢ a thousand.

Mr. Bridges: That was a contract. It cost a little more than that.

Q. How much of a skid road would have to be built there?

A. Twenty-five to Twenty-six hundred feet.

Q. Would it be necessary as Mr. Johnson stated to have two skid roads?

158 A. No, sir, no other skid road in the section.

Q. What about hauling into the canyon?

A. Slack water, shoot them right in.

Q. Is that frequently done?

A. Done right along.

Cross-examination.

By J. B. Bridges:

Q. You have to have some skid road to get your timber into the pond on the northwest quarter?
A. Not necessary, put it right in this corner.
Q. You want some skid road there?
A. Have one long skid road. There is where the timber is light. The timber would not justify building a skid road.
Q. There is a little less than 6 million on the east half of the east half on those four forties of section 30?
A. That is about the highest cruise made on that.
Q. According to this cruise a little less than 11 million on all the rest?
A. Yes. That is a short section.

JESSE MCCASH, being recalled to the stand for and on behalf of defendants, testified as follows:

Direct examination.

By W. H. Abel:

Q. Mr. McCash, have you been over section 30 to determine the cheapest and most feasible way to log it?
A. Yes sir.
Q. Please examine Defendants' Exhibit 5 and state what is the easiest and best way to log that section.
A. I was logging the claim adjoining and figured on logging it and intended putting in a small dam in this canyon.
Q. At what point?
A. Near the center line north and south.
159 Q. That is towards the center of the section?
A. Yes, sir, that can be put in most any place there.
Q. At about what cost? Have you ever put in such dams?
A. Yes sir. About $2,500.
Q. And to what extent would skid roads have to be built?
A. A little over half a mile.
Q. Up to the dead head?
A. Yes sir. You could do it without having half a mile and allow a short bench to run into this forth.
Q. In the northwest forty?
A. Yes sir.
Q. And at what cost could the section be logged?
A. Probably $2.75.
Q. Did you have in mind doing it in the way you have indicated?
A. Yes sir.

Cross-examination.

By J. B. Bridges:

Q. Now, what do you include in your estimate of $2.75 per log? What items of expense?

A. Everything. Building the dam, skid roads, moving donkeys in, hauling freight, payroll, delay, incidental expenses, break downs.
Q. Do you include depreciation?
A. Yes sir.
Q. On what?
A. Donkeys principally and line.
Q. Any other depreciation?
A. Very little.
Q. Do you include depreciation on your skid roads?
A. No sir.
Q. Or on your dam?
A. No sir. Not the dead head dam.
W. H. Abel: Did you figure the total expense of those things in there?
160 A. Yes.
Q. Did you include in your cost your office expense?
A. Yes sir.
Q. Did you include cruising expense?
A. Yes sir.
Q. Employees' insurance?
A. Yes sir.
Q. And how much would that be?
A. About 10¢ to a man a day that is industrial insurance.
Q. Did you include your taxes?
A. Yes sir.
Q. The timber on the southwest quarter is very scattering, isn't it the quarter where your skid road goes?
A. Right in the corner it is, yes sir.
Q. All over that quarter?
A. No sir.
Q. How much timber approximately is there on that southwest quarter?
A. I don't remember the exact figures.
Q. You say it is not scattering?
A. No, I didn't say it was not scattering. I said it was not scattering all over. There is a good bunch of timber near the quarter post on the southwest line.
Q. As shown by this cruise there is considerably less than two million feet of timber all told on that southwest quarter where the skid road goes through?
A. Approximately that.
Q. How much have you ever logged for yourself?
A. Half a section.
Q. All your logging has been for someone else?
A. Yes sir.
161 Q. While you were logging for someone else you were interested of course in doing as cheap logging as you could but had no money interest?
A. I wasn't interested financially, no sir.

ARCH MURRAY, a witness, called to the stand for and on behalf of defendants, after being first duly sworn, testified as follows:

Direct examination.

By W. H. Abel:

Q. Mr. Murray, are you a logger?
A. Yes, I follow that some times.
Q. How many years have you been engaged in logging?
A. About 12 years.
Q. Into fresh water?
A. Yes sir, most of the time.
Q. Has that been upon the Wishkah River?
A. Mostly on the Wishkah.
Q. Are you acquainted with the east fork of the Wishkah?
A. Yes sir.
Q. Do you know section 30-19-9?
A. I have been over it several times.
Q. What is the best way to log that section, Mr. Murray?
A. From the cruising I have done I should say it should go into the east fork of the Wishkah.
Q. With respect to the building of skid roads what skid roads would have to be built to log section 30?
A. I didn't cruise it thoroughly enough to locate the skid roads. They would follow those ridges that run from the river back.
Q. Is it feasible to drop the logs, to shoot them down into the canyon into slack water?
A. Into the back water of the dam?
Q. Yes.
A. Yes, sir, I think so.
162 Q. Is that frequently done in logging in southwest Washington?
A. It is.
Q. Can you give the court an estimate of the cost of logging section 30 per thousand feet?
A. No, I could not.

Argument.

163 DEF'TS' EX. 1.

(Small Note Book.)

Notes.

142

N. 22½ To River 387 — 529'6
To Road 1072'6

25'6	77'6	25'6	23'0	29'6	23'6
42'0	25'0	38'6	20'0	30'0	23'6
28'0	31'0	39'0 to point 591' N. of line			

K. of Road 15' south — 576 N. of line.

228'6 + 77'0 + 78'0 + 87'0 + 105'6 + 95'6 +
61'0 + 115'6 + 63'0 + 93'6 + 67'6 + 67'0 +
61'6 + 69'6 + 50'6 + 100'0 — 1320' to point.
(Page 1.)

810'6 + 23'6 834 W. 762 N.
D. C. R. 18' —N.

Mag.
C. F. L. Co.'s Road S. 18 E. or S. 41 E.
93' to River
16'6 to C. R.
River N. 86 E.
(Page 2.)

Mag. 64
N. 41° 30 E — 100' Map showing proposed road from County
N. 46° E. 650' Road to Wishkah River thru Lot 1,
C. F. L. Co.'s Road 423' Sec. 16, Twp. 18 N. R. 9 W.
N. 51 E. 500'
N. 42° 30 E. 161'6
(Page 3.)

164 (3 blank pages.)

Sec. 36.
C. R. 530' W. of Cor.
C. F. L. Co.'s R. R. 784' W. of Co. [Y]* crosses at 154 [1]* 36
C. R. 852' W. of Cor. S. 87 W. Mag.
C. E. L. Co.'s R. R. 381'6 N. of Cor. crosses at 163 [1]* 0
C. R. 633'6 N. of Cor.
C. R. notes S. 35 W. 100' from North East point
S. 6° 30 W. 75'
S. 16 E. 65'
S. 3° 30 W. 100'
S. 22 W. 68'
S. 25° 30 W. 100'
S. 37° 30 W. 100'
S. 9 W. 180'
S. 33 W. 61'6
(Page 7.)

(35 blank pages.)

[*Erased in copy.]

Min. — 210 around N. W. Cor. Sec. 32.

210	7'5	107'5		100
1			7'1	100'4
2			13'3	94'2
3	9'8	111'0½	6'0½	101'4½
4			1'8	109'4½
Tp.	1'6½	102'10	99	101'3½
7			47½	98'2½
Tp.	03	93'1½	91'½	92'10½
Tp.	03	80'10½	12 6	80'7½
Tp.	07½	68'4	13 2	67'8½
Tp.	1'3½	56'8	12'11½	55'4½
14	1'7	44'6	13'9	42'11
15	4'4	37'3	11'7	32'11

(Page 43.)

165				
17			6'7½	30'7½
Tp.	0'1	25'8½	11'7½	25'7½
Tp. (18)	0'2	15'7½	10'3	15'5½
	10			
Tp.	0'2	5'8½	10'1	5'6½
Tp.	00	96'0½	98	96'0½
Tp.	0'1	86'1½	10'0	86'0½
Tp.	0'1	76'2	10'0½	76'1
Tp.	0'5	66'6	10'1	66'1
Tp.	0'0	56'2	10'4	56'2
Tp.	0'5½	46'6	10'1½	46'0½
Tp.	0'8½	37'0	10'2½	36'3½
Tp.	0'10	25'3	12'7	24'5
Tp.	0'7	12'5	13'5	11'10

(Page 44.)

Tp.	0'0½	99'4½	13'1	99'4
Tp.	05½	86'7	13'3	86'1½
Tp.	4'10	78'2	13'3	73'4
			10'2	

Creek (2348') 232' below 210

(Page 45.)

(33 blank pages.)

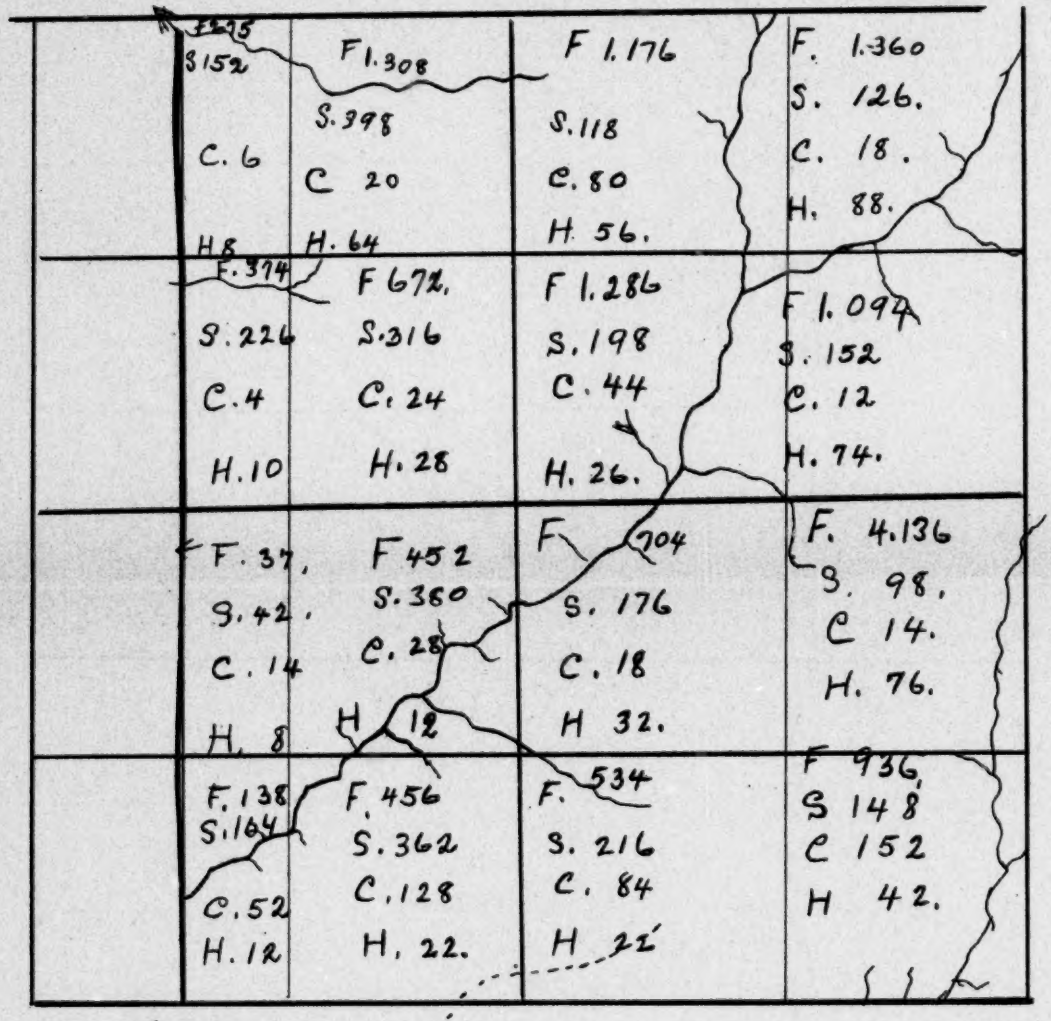
Sec. 31.

No. 112 N. 80 W. 216 paces
S. 83 W. 70 "
S. 56 W. 140 "
S. 18 W. 100 "
S. 44 W. 400 "

(Page 79.)

(9 blank pages.)

Sec. 30 Twp. 19 R 8



Ground Broken
Timber large & good

Feb. 25. 1910
Wash Lands

Fir	7.412
Spruce	2.748
Cedar	.502
Hem	300
Total	

No. 471.

State of Wash etc. v Superior Countrate } #167

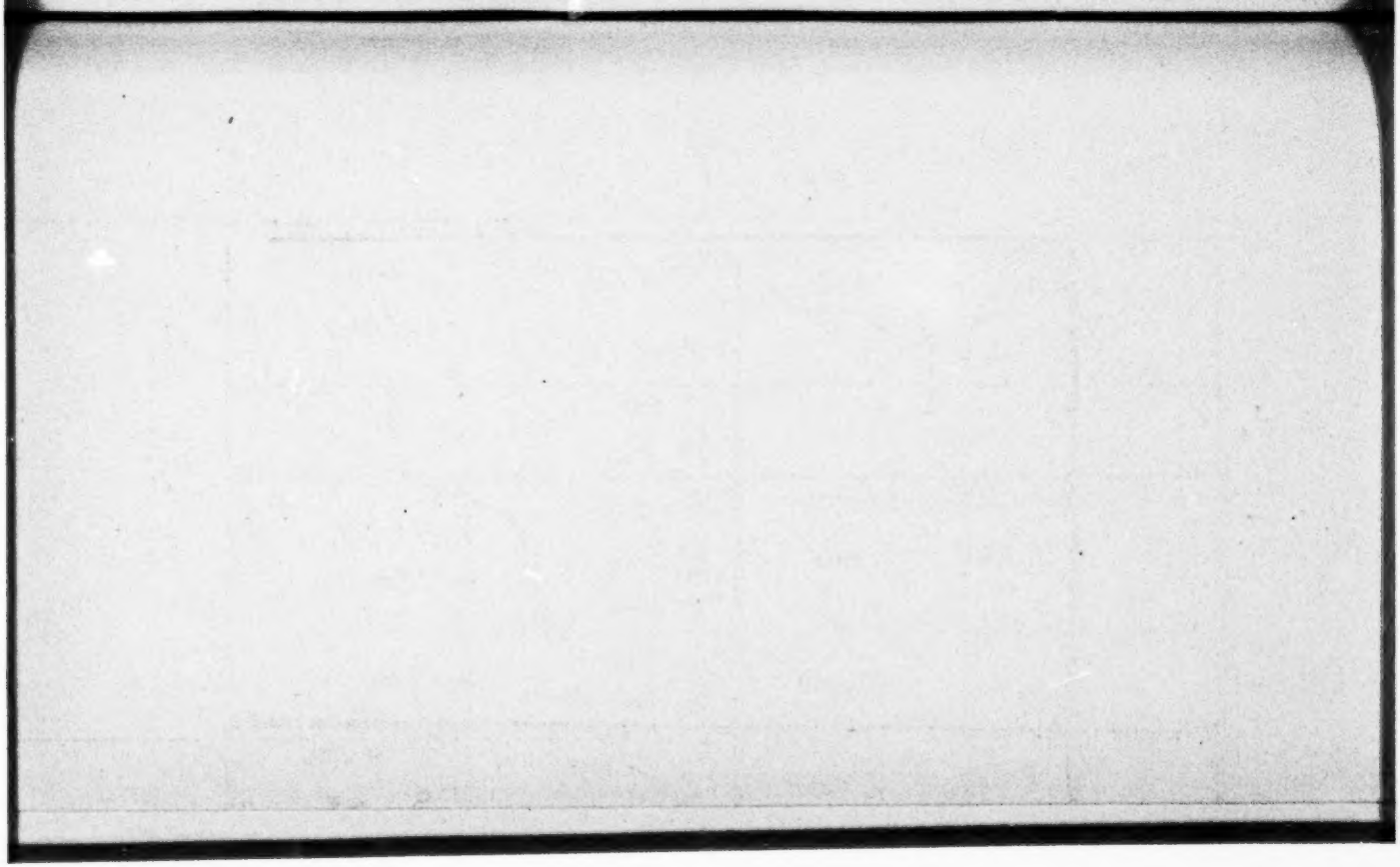
J. M. Noble

Fir	12.238 M.
Spruce	3.272 "
Cedar	760 "
Hemlock	580 "
Total	16.850 "

Hopkins Lands

Fir	4.826
Spr	524
Cedar	196
Hem	280
	5.826

167



166 DEF'TS' EX. 4.

(*Small Slip of Paper, Partly Typewritten, Partly Penciled.*)

August, 1914—Items of Cost:

	Amounts.	Averages.
Log Transportation	11,966.36	1.237
Depreciation	458.17	.047
Skidroads and landings	420.77	.043
Office Expense	325.37	.034
Discount and Interest	2,116.03	.219
Taxes	936.48	.097
Insurance	21.88	.002
Employees' Insurance	479.02	.049
Cruising Expense	135.69	.014
Right of Ways	35.16	.004
Falling and Bucking	4,442.05	.459
Hauling and Loading	15,933.75	1.647
General Expense	1,928.15	.199
	39,198.88	4.051

Output of Logs, 9,674,584 ft.

(Here follows map marked p. 167.)

168 (Indorsement on foregoing plat:) Def'ts' Ex. 5. No. 11820. Coats Fordney Log Co. vs. G. H. Logging Co. Def'ts' Ex's No. 1-4-5. Filed in the Office of County Clerk, Chehalis Co., Wash. Sep. 28, 1914. Luroy Herriman, Clerk, by —— —— Deputy.

169 Copy of Plaintiff's Exhibit "B."

ABERDEEN, WASH., Sept. 26, 1910.

We, the undersigned, hereby subscribe for the number of shares of the Coats-Fordney Logging Company set opposite our names hereto, and we agree to pay therefor in any manner provided by law.

A. F. Coats (By B. F. Johnson)	875	shares
B. F. Johnson	437½	"
Joseph W. Fordney, Trustee	2,187½	"
A. F. Coats Logging Company (By B. F. Johnson)	6,500	"
	10,000	"

Indorsed: No. 11,820. In the Superior Court of the State of Washington, for Chehalis County. Coats-Fordney Log. Co., Plaintiff, vs. Grays Harbor Logging Company et al., Defendant. Petitioner's Ex. "B." Filed in the office of County Clerk, Chehalis Co., Wash., Oct. 10, 1914. Luroy Herriman, Clerk, by W. C. Birdwell, Deputy.

170 In the Superior Court of Washington for Chehalis County.

COATS-FORDNEY LOGGING COMPANY, Plaintiff,
vs.
GRAYS HARBOR LOGGING COMPANY et al., Defendants.

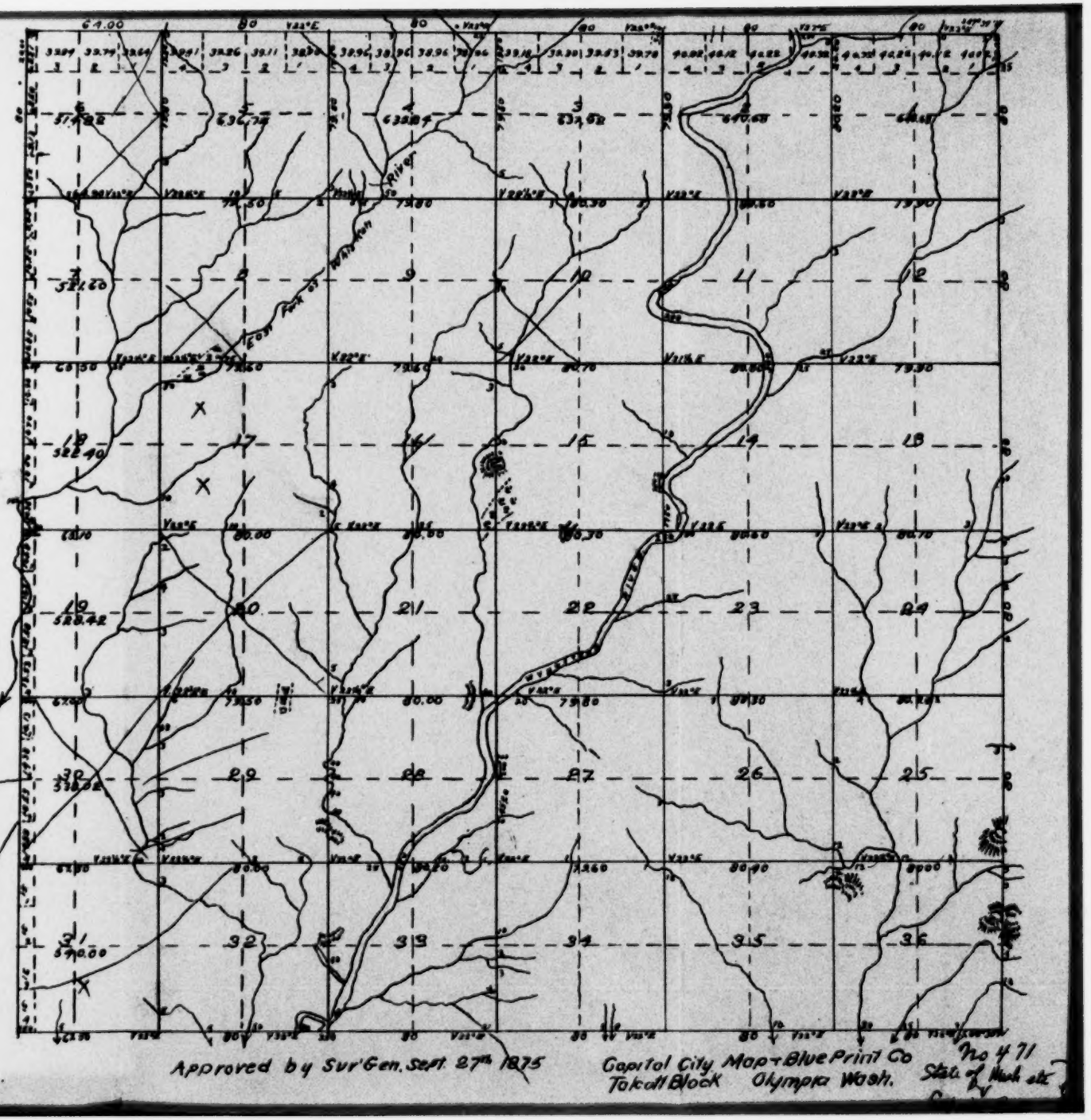
STATE OF WASHINGTON,
County of Chehalis, ss:

I, Mason Irwin, the judge who tried the foregoing cause, do hereby certify that it satisfactorily appears and I find that the statement of facts proposed by the Grays Harbor Logging Company and W. E. Boeing was duly served upon Bridges & Bruener, attorneys for the Coats-Fordney Logging Company, on the 24th day of October, 1914, and that no amendments have been proposed thereto, and that the time for proposed amendments has expired, and that the foregoing proposed statement of facts is deemed agreed to. I further certify that said statement of facts are all the matters and proceedings occurring in the above entitled cause, and the same are hereby made a part of the record herein, and that they are all that are material to said cause. Said statement of facts consists of pages 1 to 126 inclusive, and the exhibits referred to in said statement of facts are hereby ordered attached to same, being Plaintiff's Exhibits "A",

Defendants Ex 3
Cascade Forestry Logging Co
vs
Grays Harbor Logging Co
Defendant Ex 3

Filed in the Office
of the County Clerk
Chehalis Co Wash.
Sept 28. 1914
Leroy Harriman
Clerk.

171a



MAPS
TOO
LARGE
FOR
FILMING

"B", "C", "D" and "E", and Defendants' Exhibits 1, 2, 3, 4 and 5.

Dated in open court this 5 day of November, 1914.

MASON IRWIN, *Judge.*

171–172 STATE OF WASHINGTON,
County of Chehalis, ss:

I, Mason Irwin, one of the judges of the Superior Court for Chehalis County, and the judge before whom the above entitled cause was tried, do hereby certify that the matters and proceedings embodied in the foregoing statement of facts are matters and proceedings occurring in said cause upon the trial thereof, and the same are hereby made part of the record herein. I further certify that the matters and proceedings embodied in the foregoing statement of facts contain and are all the material facts, matters and proceedings heretofore occurring in said cause, and not already a part of the record herein. I do further certify that the foregoing statement of facts contains all of the evidence and testimony introduced by the respective parties upon the trial of said cause, together with all objections interposed upon said trial to the admission or exclusion of testimony offered upon and introduced at said trial, rulings of the court thereon and all exceptions thereto and all motions, offers to prove and admissions and objections, the rulings thereon and exceptions taken. I do further certify that Plaintiff's Exhibits (A) to (E), inclusive attached hereto or transmitted herewith, and Defendants' Exhibits (1) to (5) inclusive, also so transmitted or attached, are all of the exhibits admitted in evidence at said trial; and the clerk of this court is hereby directed to transmit herewith all said exhibits.

Done in open court this — day of ——, 1914.

—— ——, *Judge.*

(Here follow maps marked pages 171*a* to 171*e*.)

173 In the Supreme Court of the State of Washington.

Filed Oct. 22, 1914. C. S. Reinhart, Clerk. F. S. G.

12450.

STATE OF WASHINGTON on Relation of GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY, and Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

Notice.

To the respondents above named:

Notice is hereby given that on Friday, the 23d day of October, 1914, at the hour of 11:30 o'clock A. M. at the court room at the Temple of Justice at Olympia, Washington, the relators, Grays Harbor Logging Company and W. E. Boeing, will apply to the above entitled court for the issuance of a writ to review the proceedings of the superior court of Washington, for Chehalis county, and Mason Irwin, judge thereof, in that certain cause entitled in said Superior Court, brought by Coats-Fordney Logging Company as petitioner against Grays Harbor Logging Company and W. E. Boeing as respondents, to condemn a private logging railroad right of way across lands owned by relators, to-wit: the northwest quarter of section 32, township 19 north range 8 west.

A. M. ABEL,
Attorney for Grays Harbor Logging Co.
W. H. ABEL,
Attorney for W. E. Boeing.

To the Clerk:

Please docket the above for Friday, October 23, 1914.

A. M. ABEL AND
W. H. ABEL,
Attorneys for Relators.

174 Indorsed:

Notice.

Service of within notice admitted by receipt of a copy thereof this 20th day of October, 1914.

BRIDGES & BRUENER,
Att'ys for Coats-Fordney Log. Co.

Service of within notice admitted by receipt of a copy thereof this 21st day of October, 1914.

LUROY HERRIMAN,
Clerk Superior Court.
MASON IRWIN, *Judge.*

175 In the Supreme Court of the State of Washington.

Filed Oct. 22, 1914. C. S. Reinhart, Clerk. F. S. G.

12450.

STATE OF WASHINGTON on Relation of GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY, and Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

Petition.

Comes now the relators, Grays Harbor Logging Company and W. E. Boeing, and respectfully petition the court and allege:

1.

That on the 7th day of August, 1914, the respondent, Coats-Fordney Logging Company, a corporation, filed in the superior court of Washington, for Chehalis county, its certain petition to condemn an alleged private way of necessity for logging railroad over, upon and across the northwest quarter of section 32, township 19 north, range 8 west, in Chehalis county, said lands being then and ever since owned in fee simple by said relators, Grays Harbor Logging Company, and W. E. Boeing. That said petition alleged among other things that said Coats-Fordney Logging Company owned section 30, section 20, southwest quarter of section 8, and southwest quarter of section 10, all in township 19 north range 8 west, in Chehalis county; that said lands had thereon valuable timber which the said Coats-Fordney Logging Company proposed to log and remove over a railroad which it intended to build across the said northwest quarter of section 32, township 19 north range 8 west.

2.

That to said petition these relators filed a demurrer upon the following grounds:

176 1. Because said petition fails to state facts sufficient to constitute a cause of action, or cause for condemnation of these defendants' said lands.

2. Because the petitioner is without legal capacity to maintain the action.

3. Because this proceeding, and the statute under which this proceeding is waged, to-wit; Chapter 133 of the session laws of 1913 of the state of Washington, are contrary to, and in violation of, the constitution of the state of Washington, and of the United States.

3.

That the said superior court and Mason Irwin, Judge there after argument, erroneously overruled said *said* demurrer, to whi these relators duly excepted, and whereupon these relators several filed answers to said petition, alleging in substance and legal eff that they, these relators, Grays Harbor Logging Company and E. Boeing, owned said northwest quarter of said section 32 in simple at the time said proceeding commenced, and ever since, a that by said proceeding, the petitioner therein, Coats-Fordn Logging Company, seeks to take the said property of the s Grays Harbor Logging Company and W. E. Boeing without d process of law, and in violation of the constitution of the Uni States, and the constitution of the state of Washington, and t said attempt of the taking of their said property was for the priv use of the said Coats-Fordney Logging Company, and not for a public use, and no necessity existed therefor.

4.

That thereafter a trial was had upon said petition to conde and said answers, at which these relators offered to prove by evide that the present termini of said proposed logging railroad was section 31, township 19 north range 8 west, and that the said Co Fordney Logging Company then had a right of way and easem across said section 31 directly into said section 30, township north range 8 west, owned by it, and that its said proposed logg railroad could be built across said section 31 directly into said sect 30 at less cost than through these relators' said lands, to-w
177 the northwest quarter of said section 32; that said supe court and said Mason Irwin, judge thereof, erroneously fused to permit these relators to make such proof, to which t relators duly excepted, and assigned said refusal as error.

5.

That on the 16th day of October, 1914, the said superior co and Mason Irwin, judge thereof, erroneously made findings of and conclusions of law, to which these respondents severally d excepted, which findings of fact in substance and effect are: T it was necessary for the proper use and enjoyment of the said C Fordney Logging Company's said lands, and for the removal the timber thereon, to have and maintain a private way of neces over and across the northwest quarter of said section 32 for purpose of constructing and maintaining a private logging railr in order to take over said right of way and said railroad the tim products of said lands, and that said Coats-Fordney Logging C pany had no other available or reasonably practical route ove through which to reach said timber lands with its said log railroad, except the route sought to be acquired in said proceed and that it was necessary for said Coats-Fordney Logging Comp to cross over and upon lands which it did not own, and over w

it had no control, and through which it had no right of way for logging purposes; and that said court had jurisdiction of the subject matter of the action; and that said Coats-Fordney Logging Company had attempted to come to an amicable agreement with these relators, but had been unable to reach an agreement.

6.

That said superior court and Mason Irwin, judge thereof, erroneously on said 16th day of October, 1914, ordered and adjudged that the said Coats-Fordney Logging Company was entitled to condemn and appropriate said proposed right of way for the purpose of constructing thereon its said private logging railroad, together with spurs, switches, sidings and other improvements, for the removal of any and all timber products upon said section 30, section
178 20, southwest quarter of section 8 and southwest quarter of section 10, and that said cause be set down for trial for the assessment of damages for the taking, damaging or injuriously affecting the relators' said property, and the compensation to be made in money for the damage therein by the Coats-Fordney Logging Company, and said cause was set down for trial by jury on October 26, 1914.

7.

That the said superior court, and Mason Irwin, judge thereof, at the request of petitioner made findings of fact as follows:

2.

"That the petitioner owns section 30 in said township 19 north range 8 west. That said section contains about 16,000,000 feet of merchantable timber; that the east fork of the Wishkah river is distant from the west line of said lands about 200 feet.

3.

"That section 20 in said township 19 north range 8 west, contains about 20,000,000 feet of merchantable timber; that said land is distant from the east fork of the Wishkah river at the nearest point, about one-half mile.

4.

"That the southwest quarter of section 8 in said township is owned by petitioner; that the east fork of the Wishkah river touches one corner of said lands and the same can be logged into said river; that no necessity exists for condemning the right of way for the removal of the timber from said southwest quarter of section 8, if it is considered as a tract separate from the other lands of petition. That there is about 4,500,000 feet of merchantable timber upon said land."

8.

That said superior court, and Mason Irwin, judge thereof, although requested so to do by these relators, refused to find:

179

5.

"That the southwest quarter of section 10 in said township is owned by petitioner, and contains about 12,000,000 feet of merchantable timber. That same can be logged into the east fork of the Wishkah river a distance at the nearest point of about one mile, and that same can be logged much more easily and cheaply into said river than by petitioner's proposed railroad; that no necessity exists for condemning a right of way for the removal of the timber from said southwest quarter of section 10.

6.

That none of the petitioner's said lands are of value other than for the timber thereon. That at the rate the petitioner's logging operations have been, or, can and will be carried on, all of said timber will be removed within the period of about one year.

7.

That the petitioner has a friendly understanding with the Weyerhaeuser Timber Co., which is the owner of the northeast quarter of section 31 in township 19 north range 8 west, whereby, upon request, it can and has obtained the right to extend its road across said lands into section 30, township 19 north range 8 west.

8.

That no absolute necessity exists for the crossing by petitioner of the northwest quarter of section 32, township 19 north range 8 west.

9.

That each of the tracts of land owned by petitioner can be logged into the east fork of the Wishkah river by crossing lands belonging to the Weyerhaeuser Timber Co.; that the relations between the petitioner and said Weyerhaeuser Timber Co. are such that upon mere request, it can obtain the right to cross said Weyerhaeuser Timber Co.'s lands.

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10.

That it is feasible to log all of petitioner's timber upon all of petitioner's said lands into the east fork of the Wishkah river. That the cost thereof would not be greater than by logging the same by means of the petitioner's proposed logging railroad.

11.

That the east fork of the Wishkah river, and the Wishkah river, are navigable streams down which large quantities of logs have been removed from lands similarly situated to the lands of the petitioner; that said river affords an easy, quick and cheap way of conveying logs to the markets upon Grays Harbor."

9.

That thereupon and on October 17, 1914, and within five days after the making of said findings of fact, and order and decree of condemnation, and refusal to make said findings proposed by these relators, these relators severally duly excepted in writing to said findings, order and judgment and refusal to make findings, as follows:

1.

"The respondents, Grays Harbor Logging Company and W. E. Boeing severally except to the finding of fact numbered 1, contained in the order and decree of condemnation, and to each and every specific fact found therein.

2.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 4, contained in the order and decree of condemnation, and to each and every specific fact found therein.

3.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 5, contained in the order and decree of condemnation, and to each and every specific fact found therein.

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4.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 6, contained in the order and decree of condemnation, and to each and every specific fact found therein.

5.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 7, contained in the order and decree of condemnation, and to each and every specific fact found therein.

6.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 8, contained in the order and decree of condemnation, and to each and every specific fact found therein.

7.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 9, contained in the order and decree of condemnation, and to each and every specific fact found therein.

8.

The respondents severally except to the finding of fact numbered 10, and to the order and decree contained therein.

9.

The respondents except to the refusal of the court to make and find the respondents' proposed finding of fact number 2, as proposed by respondents, and to the refusal of the court to find that the easiest and cheapest way to log said section 30 is into the east fork of the Wishkah river.

10.

The respondents except to the refusal of the court to make and find the respondents' proposed finding of fact number 3, as proposed by respondents, and to the refusal of the court to find
182 that the easiest and cheapest way to log said section 20 is into the east fork of the Wishkah river.

11.

Respondents except to the refusal of the court to find respondents' proposed finding of fact number 4, and to the refusal of the court to find that the east fork of the Wishkah river runs through said lands, and to the refusal of the court to find that the southwest quarter of section 8 can be logged more cheaply and easily by the river than by railroad.

12.

Respondents except to the refusal of the court to make respondents' proposed finding number 5.

13.

Respondents except to the refusal of the court to make respondents' proposed finding number 6.

14.

Respondents except to the refusal of the court to make respondents' proposed finding number 7.

15.

Respondents except to the refusal of the court to make respondents' proposed finding number 8.

16.

Respondents except to the refusal of the court to make respondents' proposed finding number 9.

17.

Respondents except to the refusal of the court to make respondents' proposed finding number 10.

18.

Respondents except to the refusal of the court to make respondents' proposed finding number 11.

A. M. ABEL,
Attorney for Grays Harbor Logging Company.
W. H. ABEL,
Attorney for W. E. Boeing, Respondents.

183 10.

That the relators claim and allege that the said superior court, and Mason Irwin, judge thereof, erroneously decided that the lands of these relators was subject to condemnation for said alleged private way of necessity of said Coats-Fordney Logging Company, and that said proceeding and said attempted condemnation did not violate the constitution of the state of Washington, and the constitution of the United States, and erroneously decided said cause against the weight of evidence to the effect that said proposed right of way was not reasonably necessary for the removal of the timber upon the said Coats-Fordney Logging Company's said lands.

11.

Wherefore, These relators pray that a writ of review be issued by this court, directed unto said superior court, and Mason Irwin, Judge thereof, to certify fully to this court at a specified time and place a transcript of the record and proceedings in said cause, that same may be reviewed by this court, and requiring the respondents in the meantime to desist from further proceeding in the matter to be reviewed.

GRAYS HARBOR LOGGING COMPANY,
W. E. BOEING, *Relators.*
W. H. ABEL &
A. M. ABEL,
Attorneys for Relators.

184 STATE OF WASHINGTON,
County of Chehalis, ss:

A. M. Abel being first duly sworn, on oath, deposes and says: That he is attorney for the Grays Harbor Logging Company, one of the relators herein; that he makes this verification on its behalf and is authorized so to do; that he has read the foregoing petition, knows the contents thereof, and that the several allegations therein contained are true as he verily believes.

A. M. ABEL.

Subscribed and sworn to before me this 20th day of October, 1914.

EUNICE FLYNN,
Notary Public for Washington, Residing at Montesano.

STATE OF WASHINGTON,
County of Chehalis, ss:

W. H. Abel, being first duly sworn on oath, deposes and says: That he is attorney for W. E. Boeing, one of the relators herein; that he makes this verification on his behalf and is authorized so to do; that he has read the foregoing petition, knows the contents thereof, and that the several allegations therein contained are true as he verily believes.

W. H. ABEL.

Subscribed and sworn to before me this 20th day of October, 1914.

EUNICE FLYNN,
Notary Public for Washington, Residing at Montesano.

Indorsed: Petition. Service of within petition admitted by receipt of a true copy thereof this 20 day of October, 1914. Bridges & Bruener, Att'ys for Coats-Fordney Log. Co.

185 No. 12450.

STATE ex Rel. GRAYS HARBOR LOGGING CO. & W. E. BOERING, Relators,

v.

SUPERIOR COURT OF CHEHALIS COUNTY, MASON IRWIN, Judge, & COATS-FORDNEY LOGGING CO., Respondents.

Ordered upon the petition of the relators that a writ of review be granted to review that certain cause in the superior court of Chehalis County, wherein the Coats-Fordney Logging Co. is petitioner and the Grays Harbor Logging Co. and W. E. Boeing are respondents, and that the same be made returnable on November 13, 1914, at 10 o'clock A. M.; that relators' briefs be served and filed on or before Nov. 3, 1914, and that the respondents' briefs be served and filed within ten days thereafter.

And it is further ordered that pending the determination hereof in this court all further proceedings in said cause be stayed.

Oct. 23, 1914.

86 & 186[1] 12450.

Filed Nov. 10, 1914. C. B. Reinhart, Clerk. F. S. G.

In the Supreme Court of the State of Washington.

No. —.

TATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

UPERIOR COURT OF WASHINGTON FOR CHELALIS COUNTY and MASON Irwin, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

elators' Brief on Writ of Review to Superior Court, Chehalis County.

Hon. Mason Irwin, Judge.

A. M. Abel, Attorney for Grays Harbor Logging Company.
W. H. Abel, Attorney for W. E. Boeing, Relators.

Filed in the office of County Clerk, Chehalis Co., Wash., Nov. 5, 914. Luroy Herriman, Clerk, by W. C. Birdwell, Deputy.

86[2] In the Supreme Court of the State of Washington.

No. —.

TATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

UPERIOR COURT OF WASHINGTON FOR CHELALIS COUNTY and MASON Irwin, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

elators' Brief on Writ of Review to Superior Court, Chehalis County.

Hon. Mason Irwin, Judge.

A. M. Abel, Attorney for Grays Harbor Logging Company.
W. H. Abel, Attorney for W. E. Boeing, Relators.

186[a] In the Supreme Court of the State of Washington.

No. —.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHELALIS COUNTY and MASON IRWIN, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

Relators' Brief on Writ of Review to Superior Court, Chehalis County.

Opening Statement.

By this proceeding the Grays Harbor Logging Company and W. E. Boeing, who own in fee the North half of Section 32,
186[b] Township 19 North, Range 8 West, seek to review the findings and decree of the trial court, whereby the Coats-Fordney Logging Company, a private corporation, seeks to condemn a right of way for a logging railroad across their lands. The following assignments of error are made:

1.

As to each tract of timber lands owned by the Coats-Fordney Logging Company, it was error to hold that any necessity existed which justified the condemnation of our private property.

2.

That it was error to exclude testimony showing a feasible route across the Northeast quarter of Section 31, which would have avoided our lands.

3.

That the statute under which the court has condemned our lands is unconstitutional, and in violation of the due process of law clause in the federal constitution.

186[c] Findings of Fact Made by Trial Court.

2.

"That the petitioner owns Section 30, in said Township 19 North, Range 8 West. That said section contains about 16,000,000 feet of merchantable timber; That the east fork of the Wishkah River is distant from the west line of said lands about 200 feet.

3.

That section 20 in said Township 19 North Range 8 West, con-

tains about 20,000,000 feet of merchantable timber; that said land is distant from the east fork of the Wishkah River at the nearest point, about one-half mile.

4.

That the Southwest Quarter of Section 8 in said Township is owned by petitioner; that the east fork of the Wishkah River touches one corner of said lands and the same can be logged into said river; that no necessity exists for condemning the right of way for the removal of the timber from said Southwest quarter of Section 8, if it is considered as a tract separate from the other lands of petition-. That there is about 4,500,000 feet of merchantable timber upon said land."

186[6] Relators' Proposed Findings of Fact Refused.

5.

"That the Southwest quarter of Section 10 in said Township is owned by petitioner, and contains about 12,000,000 feet of merchantable timber. That same can be logged into the east fork of the Wishkah River a distance at the nearest point of about one mile, and that same can be logged much more easily and cheaply into said river than by petitioner's proposed railroad; that no necessity exists for condemning a right of way for the removal of the timber from said Southwest quarter of Section 10.

6.

That none of petitioner's said lands are of value other than for the timber thereon. That at the rate the petitioner's logging operations have been, or, can and will be carried on, all of said timber will be removed within the period of about one year.

7.

That the petitioner has a friendly understanding with the Weyerhaeuser Timber Co., which is the owner of the Northeast quarter of Section 31 in Township 19 North Range 8 West, whereby, upon request, it can and has obtained the right to extend its road across said lands into Section 30, Township 19 North Range 8 West.

186[7] 8.

That no absolute necessity exists for the crossing by petitioner of the Northwest quarter of Section 32, Township 19 North Range 8 West.

9.

That each of the tracts of land owned by petitioner can be logged into the east fork of the Wishkah River by crossing lands belonging to the Weyerhaeuser Timber Co.; that the relations between the petitioner and said Weyerhaeuser Timber Co. are such that upon mere request, it can obtain the right to cross said Weyerhaeuser Timber Co.'s lands.

10.

That it is feasible to log all of petitioner's timber upon all of petitioner's said lands into the east fork of the Wishkah River. That the cost thereof would not be greater than by logging the same by means of the petitioner's proposed logging railroad.

11.

That the east fork of the Wishkah River, and the Wishkah River, are navigable streams down which large quantities of logs have been removed from lands similarly situated to the lands of the petitioner; that said river affords an easy, quick and cheap way of conveying logs to the markets upon Grays Harbor."

186[9] Exceptions.

1.

"The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 1, contained in the order and decree of condemnation, and to each and every specific fact found therein.

2.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 4, contained in the order and decree of condemnation, and to each and every specific fact found therein.

3.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 5, contained in the order and decree of condemnation, and to each and every specific fact found therein.

4.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 6, contained in the order and decree of condemnation, and to each and every specific fact found therein.

5.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 7, contained in the order and decree of condemnation, and to each and every specific fact found therein.

186[9] 6.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 8, contained in the order and decree of condemnation, and to each and every specific fact found therein.

7.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 9, contained in the order and decree of condemnation, and to each and every specific fact found therein.

8.

The respondents severally except to the finding of fact numbered 10, and to the order and decree contained therein.

9.

The respondents except to the refusal of the court to make and find the respondents' proposed finding of fact number 2, as proposed by respondents, and to the refusal of the court to find that the easiest and cheapest way to log said Section 30 is into the east fork of the Wishkah River.

10.

The respondents except to the refusal of the court to make and find the respondents' proposed finding of fact number 3, as proposed by respondents, and to the refusal of the court to find that the easiest and cheapest way to log said Section 20 is into the east fork of the Wishkah River.

186[10]

11.

Respondents except to the refusal of the court to find respondents' proposed finding of fact number 4, and to the refusal of the court to find that the east fork of the Wishkah River runs through said lands, and to the refusal of the court to find that the Southwest quarter of Section 8 can be logged more cheaply and easily by the river than by railroad.

12.

Respondents except to the refusal of the court to make respondents' proposed finding number 5.

13.

Respondents except to the refusal of the court to make respondents' proposed finding number 6.

14.

Respondents except to the refusal of the court to make respondents' proposed finding number 7.

15.

Respondents except to the refusal of the court to make respondents' proposed finding number 8.

16.

Respondents except to the refusal of the court to make respondents' proposed finding number 9.

17.

186[11] Respondents except to the refusal of the court to make respondents' proposed finding number 10.

18.

Respondents except to the refusal of the court to make respondents' proposed finding number 11."

186[12] Question of Necessity as to Southwest Quarter of Section 8.

The undisputed evidence shows that the East Wishkah River flows through the land. The river is navigable. A driving company, which is a public service corporation, operates thereon. Down this river logs are taken to market every day in the wet season and every few days in the dry season. There is no dispute upon this point. The court, by its finding No. 4, expressly found that there was no necessity for condemning a right of way to remove the timber from this tract if it is considered a tract separate from the other lands described in the petition.

Yet this land is a separate tract. It is two miles from section 10. It is over a mile to section 20. It is over two miles to section 30. Certainly as to this tract no necessity for condemnation whatever has been shown.

Southwest Quarter Section 10.

186[13] This tract, at its nearest point, is distant from the east fork of the Wishkah River slightly over a mile. There is much testimony showing it is entirely feasible to log the tract into the river. This could be done at reasonable cost.

Section 20.

This is distant from the east fork of the Wishkah River about one-half a mile. It could be easily logged to the river at a reasonable cost.

Section 30.

The undisputed evidence shows that this section of timber is distant from the east fork of the Wishkah River at the nearest point, about 200 feet. While the court declined to so find, yet the evidence clearly shows the cost of logging the same into the river is much cheaper than building a main railroad at least three-quarters of a mile in length, and then one-half a mile spur track.

Cost of Logging to River.

Upon the cost of logging to river we call the court's atten-
186[14] tion to the testimony of the several witnesses for the defense commencing at page 82 of statement of facts. Attention is also directed to the township map, defendant's exhibit 3, and to the petitioner's map, plaintiff's exhibit C. The latter exhibit shows the entire course of the east fork of the Wishkah, and shows the relative position of section 30, and the other lands.

186[15] Error in Refusing to Admit Testimony.

At present the petitioner's logging railroad is in Section 31. At the trial we sought to show that at reasonable cost the road could be extended directly north through the Northeast quarter of Section 31 into Section 30. Although the petitioner was permitted to show the alleged impracticability of extending its road across the Northeast quarter of Section 32. (St. 7, 17, 21, 27.) Yet, the court sustained a motion to strike out all the testimony of witnesses for these appellants showing that there were other routes over Section 31. To which an exception was duly preserved. The following excerpt shows the court's position, which we submit was clearly error:

"Mr. Bridges: Motion to strike the testimony of the witnesses concerning these other routes over section 31, as immaterial.

The Court: Motion sustained. Exception.

186[16] W. H. Abel: We offer to show by the witnesses, Mike Parrott, C. W. Blackwell, Cy McLean, Jesse McCash, Andrew Droski, Rodney Maxwell and Archie Murray and Frank Noble that each of them are experienced loggers by railroad, except Rodney Maxwell, who is a construction engineer, and that it is entirely feasible to cross section 31 at a reasonable cost in the building of a logging railroad to run north to sections 20 and 30 and the southwest quarter of section 10 and the southwest quarter of section, all in 19-8.

Mr. Bridges: It is possible that if they can prove that the other routes shown on this map are more acceptable and better routes, then it is possible that we might have to go that way. I don't concede that.

The Court: That does not affect it unless you have the right to go through where they are suggesting but you have no right to cross that section except where you are proposing to cross it.

Mr. Abel: Exception."

(St. 82.)

186[17] Due Process of Law.

It is generally conceded that the national government can exercise such powers only as are expressly or impliedly granted to it, but that the several states have such powers as have not been taken from them: that is, the states are governments exercising reserved powers. Judge Gose in Mountain Timber Company case (77 Wash. 585), pointed out that the right of the State of Washington to exercise the

power of eminent domain was not granted by the state constitution, but was a reserved power, not granted, but merely reserved. Conceding the correctness of this view, it follows that the power of eminent domain is to be measured by the common law scope and definition of that term.

One of the provisions of Magna Charter was that no man should be dispossessed save by the law of the land. The development of the idea of due process of law springs from this rule. At the common law, private property could not be taken, under the eminent domain power, for private use. Weeks, Damnum Absque
186[18] Injuria, cites the English cases on this point. The right of eminent domain does not include the power to take private property for private use.

The theoretical law writers, and the courts, agree that the power of eminent domain is the power to take private property for public use. The power does not involve the taking of private property for private use.

Pom. Mun. Law, 2nd Ed., sec. 674.
Wharton, Com. Am. Law, Sec. 572.
Demarest, Studies in Am. Jur. 10.
Bouvier's Law Dictionary, Eminent Domain.
Broom's Legal Maxims, 3.
Weeks, Damnum Absque Injuria, Sec. 14.
Tiedeman, Real Property, Sec. 753.
Black, Const. Law, 2nd Ed. 168.
Cooley, Const. Lim. 6th Ed. 654.
Mills, Eminent Domain, Sec. 1.
Elliott, Roads & Streets, 3d Ed. Sec. 14.
Dillon, Mun. Corp. Sec. 584.
1 Lewis, Eminent Domain, Sec. 1. 250.
Tiedeman, State & Federal Control, Sec. 141.
West River Bridge Co. vs. Dix, 6 How. 507.
2 Kent's Com., 5th Ed. 340.

Broom, supra, shows the right of eminent domain is based
186[19] upon the maxim of the Roman law: salus populi suprema lex.

Pomeroy, supra, says:

"The right of eminent domain is that right which the Government possesses to take the private property of an individual, and appropriate it to a public use. It is based upon that supreme authority which the state, the entire body politic, holds over all its members; it flows from the principle that the rights and convenience of an individual must yield to the higher necessities or convenience of the whole."

Cooley, supra, says:

"The public use implies a possession, occupation, and enjoyment of the land by the public at large or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over

to another, on vague grounds of public benefit, to spring from the mere profitable use to which the latter may devote it."

Weeks, supra, cites approval to English cases thus:

"And for the public utility, the legislature may interfere with private property, and compel the owner of land to alienate
186[20] his possessions, on receiving a reasonable price and compensation; but the power is not to be exercised to a greater extent than is absolutely necessary for the public welfare."

Tiedeman, State & Federal Control, supra, says:

"The authorities are unanimous in the recognition of the abstract proposition, that the legislature cannot in the exercise of the right of eminent domain, even when the compensation is made on the most liberal terms, take the land from a private owner and appropriate it to any but a public use."

Mills, Eminent Domain, supra, says:

"The power of the sovereign to condemn private property for public use."

Dillon, supra, defines eminent domain as follows:

"The right of every government to appropriate, otherwise than by taxation and its police authority (which are distinct powers), private property for public use."

Lewis, Eminent Domain, supra:

"Eminent domain is the right or power of a sovereign
186[21] State to appropriate private property to particular uses, for the purpose of promoting general welfare."

Wharton, Com. Am. Law, supra, says:

"Eminent domain, therefore, in the sense in which the term is used in this relation, is the right of a sovereign to appropriate private property for public purposes when required by public need, proper compensation being made therefor. In the states, the right of eminent domain resides in the state itself, as represented by its specific government."

Kent, in 2 Kent's Com., supra, said:

"I apprehend that the decision of the court was founded on just principles, and that taking private property for private uses, without the consent of the owner, is an abuse of the right of eminent domain, and contrary to fundamental and constitutional doctrine in the English and American law."

At the time our state constitution was adopted the right of eminent domain, as shown by the foregoing statements by text writers,
was merely the right to take private property for public use.
186[22] Later, we shall discuss what is meant by public use. Here we note that a private way of necessity, as known to the common law, was an easement arising by grant, or by estoppel.

Schulenbarger vs. Johnstone, 64 Wash. 202.

Gayetty vs. Bethune, 7 Am. Dec. 192.

We now undertake to show by decisions of the courts that at the time the fourteenth amendment to the federal constitution was adopted, the power of eminent domain was never exercised to take

property for private use. This confirms the uniform view of text writers that private property can be taken only for some public use.

Wilkinson vs. Leland, 2 Pet. 657.
Taylor vs. Porter, 40 Am. Dec. 274 (N. Y.)
Sadler vs. Langham, 34 Ala. 311.
Nesbitt vs. Trumbo, 89 Am. Dec. 290 (Ill.)
Wild vs. Deig, 13 Am. Rep. 339 (Ind.)
Osborn vs. Hart, 24 Wis. 89.
Bankhead vs. Brown, 25 Ia. 540.
Witham vs. Osburn, 4 Ore. 319.
Gillan vs. Hutchinson, 16 Cal. 154.
Cooper vs. Williams, 5 Ohio 393.
Dickey vs. Tennison, 27 Mo. 373.

186[23] In Wilkinson vs. Leland, supra, the Supreme Court of the United States, speaking by Story, J., said:

"That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people."

In Taylor vs. Porter, supra, the Supreme Court of New York, speaking by Bronson, J., said:

"But the question does not necessarily turn on the section granting legislative power. The people have added negative words, which should put the matter at rest. 'No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or
186[24] the judgment of his peers'; Const., art. 7, sec. 1. The words, 'By the law of the land,' as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with' the 'legislative power of the state'; but no one 'shall be disfranchised, or deprived of any of the rights or privileges' of a citizen, unless you pass a statute for that purpose'; in other words, 'You shall not do the wrong, unless you choose to do it.' The section was taken with some modifications from a part of the twenty-ninth chapter of Magna Charta, which provided, that no freeman should be taken, or imprisoned, or be dis-seized of his free hold, etc., but by lawful judgment of his peers, or by the law of the land. Lord Coke in his commentary upon this statute says, that these words 'by the law of the land,' mean 'by due course and process of law'; which he afterwards explains to be, 'by indictment or presentment of good

and lawful men, where such deeds be done in due manner, or by writ original of the common law.' 2 Inst. 45, 50."

In Sadler vs. Langham, supra, the Supreme Court of
186[25] Alabama said:

"Another, and perhaps more valuable provision of our constitution, declares that the citizen shall not be deprived, of his 'property, but by due course of law.' Without intending, at this time, to define the full meaning of the constitutional phrase, due course of law, it evidently does not mean a transfer of property by mere legislative edict, from one person to another. Nor will the usurpation be healed, by bringing a judicial tribunal to sit as a passive witness to the ceremony. The due course of law, by which a citizen may be deprived of his property, is something more substantial than this,—Dorman vs. The State, at the present term (34 Ala. 216).

We feel justified in laying down the following rules:

1. The legislature cannot, either with or without compensation, take private property for private use.—1 Bl. Com. 139; B. & L. R. Cor. vs. S. & L. R. Co., 2 Gray 137 (61 Am. Dec. 444); Taylor vs. Porter, 4 Hill, 140 (40 Am. Dec. 274); Embury vs. Conner, 3 N. Y. 511 (53 Am. Dec. 325); Ten Eyck vs. D. & R. C. Co., 18 N. J. Law, 200 (37 Am. Dec. 233); Varvick vs. Smith, 5 Paige 137 (28 Am. Dec. 417); Parham vs. Justices, etc., 9 Ga. 341; Hall vs. Boyd, 14 Ga. 1; (Ex parte Martin) 13 Ark. 198 (58 Am.
186[26] Dec. 321); Wilkinson vs. Leland, 2 Pet. 657 (7 L. Ed. 542)."

In Nesbitt vs. Trumbo, supra, the Supreme Court of Illinois, after citing many cases holding that it was against the law of the land to take private property for private use, said:

"These, so far as we have had time for examination, are the cases in which the principle has been applied under constitutional provisions, if not similar, substantially the same as those contained in ours. And they seem to fully sustain the objection that the law is unconstitutional, and that the legislature is powerless to afford the means by which a person can procure the right of way over another person's land without his consent. His right seems to be supreme, except where it is needed for public use, and then he must be compensated before it can be taken.

Nor can there be the slightest pretense in this case that this way was, in any just sense, for public use. It was alone for individual or private use. From these decisions, the doctrine seems to be too well and firmly established, whatever may have been our preconceived opinions, to be now shaken. And to hold that the legislature might exercise this power would doubtless open the way
186[27] to other and more serious encroachments upon the right of property, which was designed to be secured by this most salutary provision. In the light of these authorities, we feel compelled to hold this provision of the law unconstitutional."

In Wild vs. Deig, supra, the Supreme Court of Indiana condemned as unconstitutional, a law authorizing eminent domain proceedings to obtain a private way of necessity, and said:

"The constitutionality of the provision depends upon the power of the legislature to authorize the appropriation under the right of eminent domain. In the case of the Water Works Co., etc. vs. Burkhard, 41 Ind. 364, it was said, that 'the right of eminent domain, that is, the ultimate right of the sovereign power to appropriate, not only public property, but the private property of all the citizens within the territorial sovereignty, to public purposes, is inherent in the government. * * * It is to be exercised only when the public exigencies require it. * * * If the legislature attempts, under the power of taking property under the right of eminent domain, to take property confessedly not for public use, then the courts may prevent it.' Mr. Cooley, in his work on Constitutional Limitations, says: 'It is conceded on all hands that the
186[28] legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit. * * * It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such a case would be the property of him for whom it was established'."

In Osborn vs. Hart, supra, the Supreme Court of Wisconsin, in denying that a private way of necessity could be obtained by eminent domain proceedings, said:

"When, therefore, land is taken for a private road, under our statute, it is taken for a private and not a public use; the public has no right to use the road, but it is laid out solely for the benefit and convenience of the applicant. In some of the states it has been held that these roads, although termed private, yet were in fact public roads so far as the right to use them was concerned, and upon this ground the power of the legislature to authorize them to be laid out has been sustained,"—

"But this question whether the legislature can authorize private roads to be opened through the land of persons not con-
186[29] senting thereto, even upon making compensations, has been so fully discussed in Taylor vs. Porter, supra; Sadler vs. Langham, 4 Ala. 311; and Dickey vs. Tennison, 27 Mo. 373, that further remarks here seem to be unnecessary. These cases, and many others which might be cited to the same point, while fully recognizing the doctrine of eminent domain, by which private property may be appropriated to the public use upon compensation being made therefor, still deny that it can be taken for strictly private purposes without the consent of the owner, whether compensation is made or not. And it seems to us that the assertion of a right on the part of the legislature to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest is not promoted thereby, is claiming a despotic power, and one inconsistent with every just principle and fundamental maxim of a free government."

In Witham vs. Osburn, supra, the Supreme Court of Oregon held that it was contrary to the law of the land to permit condemnation for a private way of necessity and said:

"All separate interests of individuals in property are held by the government under the tacit agreement, or implied reser-
186[30] vation, that the property may be taken for public use upon paying a fair compensation therefor, whenever the public interest or necessities require that it should be so taken. The right of eminent domain does not, however, imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for full compensation, when the public interest will in no way be promoted by such transfer."

In Gillan vs. Hutchinson, supra, the Supreme Court of California, said:

"The legislature has no power to take the property of one person and give it to another."

In Bankhead vs. Brown, supra, Judge Dillon, in holding a private way statute to be unconstitutional, relied on the constitutional provision that no person shall be deprived of life, liberty or property without due process of law, and said:

"Wherever, by any well-considered decision, private roads have been sustained, it was because they were regarded as public in their character; and if properly so regarded, laws authorizing their
186[31] establishment would doubtless be valid. But, as we have seen, roads established under the Iowa act of 1866 are private in their character and not public, and are, as to amendment and repairs, within the jurisdiction of the road or township officers."

What is meant by public use? This court has approved the definition contained in Lewis, Eminent Domain, Sec. 258:

"Public use means use by the public."

Considerations of public good, public welfare, public interest have often been used to broaden the scope of the idea expressed in the phrase, public use. Some of the states, by constitution or statute, have declared that the irrigation of arid lands, the drainage of swamp lands, and the like, are public uses. Our own constitution recognizes that drains, flumes, and ditches are subjects of public use. With these matters we have no quarrel.

But a consideration of the statute under discussion shows it to be strictly private. The title is:

186[32] "An Act relating to the taking of private property for private ways of necessity, and for drains, flumes and ditches on or across the lands of others for agricultural, domestic or sanitary purposes."

Statute 1913, pg. 412.

The first section provides only for a private way of necessity. The third section recognizes the right of the person acquiring the private way of necessity to cease using the same.

Such a private way of necessity originates by the act of a private individual; it is at the cost of the private owner that it is constructed and kept in repair; and may be abandoned at the pleasure of the private individual. By every test it is strictly private and not public. These tests are fully stated and discussed by Judge Dillon in Bankhead vs. Brown, 25 Iowa, 540.

We have established by the foregoing that the right of eminent

domain does not include the power to take private property for private use; that at the common law, under the eminent domain power, private property can only be taken for public use; that the text writers and courts are unanimous that the eminent
186[33] domain power does not extend to taking private property for private use. The decision of the Supreme Court in Wilkinson vs. Leland, by Story, J., and the decisions by the several state courts show that it has always been considered subversive of the rights of private property to permit condemnation for private use. This principle was firmly established in Magna Charta. It was part of the laws of the land of England. It became part of the law of the land of the United States. It is within the protection of the fourteenth amendment to the federal constitution. That amendment provides:

"* * * Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This point—the right to take private property for private use—was considered by the United States Supreme Court in Mo. Pac. Ry. Co. vs. Nebraska, 164 U. S. 403. Therein it was said:

"The taking by a state of the private property of one
186[34] person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States."

This decision was cited approvingly by this court in N. P. vs. Com., 58 Wash. 360.

We have seen that the reserved right of eminent domain possessed by the sovereign state is the right to take private property for public use, but not for private use; that the latter would be taking private property without due process of law, and contrary to the fourteenth amendment to the federal constitution. Thus, arises a conflict between the state constitution, which recognizes that a private way of necessity can be acquired by eminent domain proceedings. Sec. 16, Art. 1, of our constitution provides:

"Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made."

186[35] Our position is that this provision of the state constitution, in so far as it recognizes, implies or grants the right to take private property for private use, conflicts with the due process of law clause of the federal constitution. It runs counter to Magna Charta, and the common law.

The New York constitution, Sec. 7, Art. 1, provides:

"* * * Private roads may be opened in the manner to be prescribed for roads; but in every case the necessity for the road and the amount of all damages to be sustained by the opening thereof, shall be determined by a jury of freeholders."

Yet, the Supreme Court of New York has held that a private way of necessity cannot be acquired by eminent domain proceedings, and that the statute so providing is unconstitutional, and void.

Taylor vs. Porter, 40 Am. Dec. 274 (N. Y.).

In the opinion in the Mountain Timber Company case, the court sustained the statute under consideration as not in conflict with the fourteenth amendment to the federal constitution in
186[36] these words:

"The taking of private property for private use for the promotion of the general welfare, upon due notice and hearing and the payment of compensation, is not incompatible with due process of law, as guaranteed by the Federal Constitution. Head vs. Amoskeag Mfg. Co., 113 U. S. 9."

Head vs. Amoskeag Mfg. Co., supra, does not sustain the reference. In that case, a public use statute was involved. The statute provided for a committee to determine the question of public use, and provided for a review proceeding in court to determine the question of public use. In no sense was the right to take private property for private use involved. Moreover, the case was decided on the question of the right of the state to regulate the use of its streams.

A rather careful search has not disclosed any decision by the United States Supreme Court where private property has been taken by eminent domain proceedings for private use. In every instance, where the court has sustained the taking of a way
186[37] of necessity, it has based its decision on the ground that the state laws or state policy declared the same to be a public use.

In Tiedeman, State and Federal Control (Vol. 2, Sec. 141), the subject is elaborately discussed and the conclusion reached that the taking of private property by eminent domain proceedings is never justifiable unless for public use. This public use may be based on public welfare, benefit or good, or public need, but never on individual use.

Thus, in Elliott, Roads and Streets (Vol. 1, Sec. 14), it is said: "There is some conflict among the decisions as to the constitutionality of statutes attempting to confer or delegate the right to exercise the power of eminent domain for the purpose of establishing private roads. The conflict, however, is not so much as to the general principle as it is as to what are private roads, or, in other words, as to what is a public and what is a private use. If it is essentially private and members of the public are excluded from its use it seems clear that the power of eminent domain cannot be invoked."

In the discussion of this question, it is needful to re-
186[38] member, as pointed out by Gose, J., in the Mountain Timber Company case, that the right of eminent domain is not granted by the state constitution, but is a reserved power of sovereignty. Doubtless, in Russia, private property can be taken for private use, under the eminent domain power. But, as we have seen, this power rests upon the maxim of the Roman law, salus

populi suprema lex. The way of necessity known to the common law was never obtained by eminent domain proceedings.

Our conclusion is that the statute under discussion (Laws 1913, pg. 412), is unconstitutional, and in violation of the due process of law clause of the federal constitution.

It will be urged that this result is only obtained by holding our state constitution violative of the federal constitution, in that it provides for eminent domain proceedings to acquire private ways of necessity. Yet, there is a way out.

That way out is indicated by the Supreme Court of California in Sherman vs. Buick, 32 Cal. 242. A private way of necessity
186[39] was there sustained as a branch of the public road system; subordinate roads subject to use by the public, but in fact used by few.

Our statute is not of this kind. Only the particular individual who acquires by condemnation the private way can use the same; it is not open to the use of the public; it is strictly a private individual way.

We submit the following list of cases holding that a strictly private way cannot be acquired by eminent domain proceedings against the consent of the owner:

Welton vs. Dickson, 22 L. R. A. 494 (Nebr.).
Logan vs. Stogdale, 8 L. R. A. 58 (Ind.).
Arnsperger vs. Crawford, 70 L. R. A. 497 (Md.).
Chesepeake vs. Moreland, 16 L. R. A. n. s. 479 (Ky.).
Clark vs. Board, 66 L. R. A. 965 (Kans.).
Town vs. Klamath, 53 Pac. 604 (Ore.).
Fanning vs. Gilliland, 61 Pac. 636 (Ore.).
Cozad vs. Kara-wha, 1 L. R. A. n. s. 969 (N. C.).

In the Mountain Timber Co. case this court cited Lam-
186[40] born vs. Bell, 32 Pac. 989. But in that case the point raised in this brief that the due process of law clause in the federal constitution forbids the taking of private property for private use was not discussed nor decided. This applies also to the case of Jones vs. Venable, 47 S. E. 549 (Ga.).

It will be argued that the constitutions of several states provided for condemnation for private ways of necessity. But an examination of the cases show-, it is believed, that the private ways of necessity are really public ways.

Thus, in Latah County vs. Peterson, 16 L. R. A. 81, under a constitution which provides for condemnation for private way of necessity, the court held that such private way was actually for a public purpose, and was subject to use by all who desired to use it. We call the court's attention to the note to this case on the constitutional question.

186[41] *Summary.*

For the reasons stated in this brief the statute under review should be held unconstitutional, the proceedings under review should be declared illegal and the decree and order of condemnation reversed

and the proceeding dismissed. Should the court refuse to hold the statute to be unconstitutional, the judgment should be reversed with instructions to take testimony as to the feasibility of other routes to reach the Coats-Fordney Logging Company's timber; and the right of condemnation denied at least as to Section 30, and the Southwest quarter of Section 8.

Respectfully submitted,

A. M. ABEL,
Attorney for Grays Harbor Logging Company.
W. H. ABEL,
Attorney for W. E. Boeing.

186[42] STATE OF WASHINGTON,
County of Chehalis:

E. M. Whalen, being first duly sworn on oath, deposes and says: That on November 2, 1914, she served on Bridges & Bruener a typewritten copy of the within brief; and on November 3, 1914, served on them the abstract in this cause, and on November 4, 1914, served 3 copies of the within printed brief upon them. That in each instance, said service was made by mail by depositing the same in the Post Office at Montesano, securely enclosed with postage thereon duly prepaid, and addressed to Bridges & Bruener, Aberdeen, Washington. That there is a daily mail communication between Montesano and Aberdeen.

E. M. WHELAN.

Subscribed and sworn to before me this 4th day of November, 1914.

W. H. ABEL,
Notary Public for Washington,
Residing at Montesano, Wash.

187 & 187[1] 12450.

Filed Nov. 13, 1914. C. S. Reinhart, Clerk. F. S. G.

In the Supreme Court of the State of Washington.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,
vs.
SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY and Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

Appeal from the Superior Court of Chehalis County.

Brief of Respondents.

Bridges & Bruener, Attorneys for Respondents; P. O. Address: Aberdeen, Wash.

187² & 187³ In the Supreme Court of the State of Washington.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY and Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

Brief of Respondents.

Relators' chief argument is addressed to the constitutionality of the Act of 1913, under which these proceedings have been instituted.

187⁴ This court in the case of State of Washington on the relation of Mountain Timber Co. v. The Superior Court of Cowlitz County, 77 Wash. 585, has expressly upheld the constitutionality of the act in question. In that case not only did this court uphold the act as not violating the provisions of the Constitution of the State of Washington, but likewise upheld it as not violating the Federal Constitution. Contrary to the usual custom of the court, the opinion in the Mountain Timber Co. case was concurred in not only by one division of the court but all the members of the bench.

While we do not want it to appear that we fail to have due respect for relators' brief on this question, yet, under the circumstances, we feel that it is wholly unnecessary for us to here undertake to uphold the constitutionality of this act.

187⁵ In the event the court, for any reason, should desire us to brief this question, we will be very glad so to do.

On the Merits.

The findings of fact made by the trial court as contained on page 5 of relators' brief, are only those findings which were submitted to the court by the relators. As a part of the order of condemnation, the court made numerous other findings. It found, among other things, that the Coats-Fordney Logging Company was duly incorporated; had paid its license fees; that its capital stock had all been subscribed as provided by law, and that under its articles of incorporation it was authorized to do a general logging business by railroad and otherwise; that the petitioner was the owner of all of Section 30, all of Section 20, the S. W. ¼ of Section 10, and the S. W. ¼ of Section 8, all in Township 19, North of Range

187⁶ 9, West, in Chehalis County, all of which lands are to the north of the lands of the relators, through which a right-of-way is sought; that petitioner's lands have large quantities of valuable timber thereupon; that the petitioner for many years last past, has been, and still is, engaged in the business of removing timber to market by means of a private logging railroad; that petitioner has constructed and in operation, a main line of logging railroad

extending from the easterly bank of the Wishkah River at tidewater, northerly to a point in Section 31, said township and range, and that such railroad is fully equipped for logging purposes; that it is necessary, for the proper use and enjoyment of petitioner's lands, and for the removal of the timber thereupon, to have and maintain a private way of necessity over the respondents' lands, such way of necessity to be 50 feet in width, being 25 feet on each side of the
187[7] center line, which was particularly described;

"that the petitioner has no other available or reasonably practical route over or through which to reach the said timber lands with its said logging railroad, except the route sought to be acquired herein, a particular description of which is hereinafter set out; that in order to remove the said timber by means of its said logging railroad or otherwise, it is necessary that the said petitioner cross over and upon lands which it does not own and over which it has no control and through which it has no rights of way for logging purposes."

In other words, the trial court found that the petitioner was entitled to condemn and appropriate the right-of-way in question, for the purpose of removing all of the above mentioned timber.

187[8] Relators contend that the petitioner should not be permitted to appropriate this right-of-way, for two reasons: First, because the timber should be put into the east fork of the Wishkah River and thus brought to market; and second, because the petitioner could extend its line of railroad through the N. E. ¼ of Section 31, and thus obtain the timber without going across the respondents' lands.

In all these regards the lower court, after hearing considerable testimony, found against the respondents.

This court, in the case of Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, in construing the general Eminent Domain Act, said:

"But the word 'necessity' as used in the statute, does not mean an absolute and unconditional necessity, as determined by physi-
187[9] cal causes, but a reasonable necessity, under the circumstances of the particular case, dependent upon the practicability of another route, considered in connection with the relative cost to one and probable injury to the other."

In the Mountain Timber Co. case, involving the particular statute in question, this court said:

"The word 'necessity' means reasonable necessity."

The question involved then, is whether or not there is a reasonable necessity, under all of the circumstances, for the Logging Company to acquire this right-of-way.

In considering the matter, it must at all times be remembered that the Logging Company is in the business of logging by means of a railroad and not by means of water; that it has been so log-
187[10] ging for a great number of years; that it has constructed, fully equipped and in operation, a main line of logging railroad some six or eight miles in length and terminating near the center of Section 31; that it has numerous branch lines; that it has a

very great investment in these logging railroads and the equipment therefor; that in order to get the timber involved in this case, its main line would be extended into Section 20, and the timber from the various other sections owned by the Logging Co. would be removed by branch lines; that if it be required to take this timber down the river, its whole logging road and equipment must be idle and its investment therein earning nothing, while at the same time all overhead charges will be going on.

If the Logging Company did not now have its railroad within a mile or two of the timber which it desires to remove, a different question might arise. The land owner seeks to require the
187[11] court to hold that these several pieces of timber should be segregated and each piece be considered separate from each other piece. Manifestly this cannot be done. These various sections of timber so far as this action is concerned, constitute one body of timber, and to say that one or two pieces of the timber can be removed cheaper by water, is to beg the whole question. The lower court refused to consider any of these tracts of timber as separate tracts, but considered them all as one body of timber which the Logging Company desires to remove by means of its railroad already in existence.

Let us now look at the testimony concerning these various tracts of timber.

Section 30.

The testimony shows that the main line of the road would
187[12] be built to about the center of Section 29, which would be about one mile of additional main line, and that a branch would then be thrown out into Section 30, for the purpose of getting the timber in that section. All of the Logging Company's witnesses, being seven in number, testified that it would be cheaper and more economical for the petitioner to remove the timber by its railroad, than down the river. Practically an equal number of the land owners' witnesses testified that it would be as cheap or cheaper to remove this timber down the river. Taking section 30 as separate from all other lands, we believe it fairly appears from the testimony, that the westerly portion of Section 30 could be brought down the river a little cheaper than extending the railroad to it and bringing it down in that manner; but that that portion of the timber on the easterly part of the section, could be most cheaply brought
187[13] down by the railroad. The testimony further shows that the timber nearest the river is very scattering, whereas the larger amount of the timber on the section is found on the easterly half. We believe, therefore, that the testimony conclusively shows that this Section 30 can be brought out by rail cheaper than by water.

In any event, the testimony shows that the timber on Section 20 can be removed materially cheaper by railroad than by water, and since the road must be extended up to Section 20 for the purpose of removing that timber, there ought to be no question whatsoever, but what Section 30, when taken into consideration with Section 20, can be removed by the Company's railroad much cheaper than by water.

Section 20.

The average haul of the timber in Section 20, to the east
187[14] fork of the river, would be at least a mile and a half, which is almost prohibitory. An extension of the main line of railroad from its present northerly terminus to Section 20, would be about a mile and a half, so that it is very manifest that the timber in Section 20 can be removed cheaper and more economically by the railroad than by water. We believe no witness undertakes to say that this section can be logged cheaper by water than by rail, and the relators, in their brief, do not go further than to assert that the timber "could be easily logged into the river at a reasonable cost."

S. W. ¼ of Section 10.

This quarter section is heavily timbered and has something like ten million feet on it. The average haul to the east fork of the river
187[15] would be fully a mile and a half, and manifestly such a long haul is never desirable and is never made when there is any way of avoiding it. Nearly all of the witnesses on both sides, seem to agree that this quarter section should come out by railroad, or that at least it was not well located for logging into the river.

S. W. ¼ of Section 8.

The east fork of the Wishkah River runs through a part of this quarter section, and the trial court found:

"that no necessity exists for condemning the right-of-way for the removal of the timber from said S. W. ¼ of Section 8, if it is considered as a tract separate from the other lands of petitioner."

Yet the trial court refused to consider this land as a tract separate from the rest of the Logging Company's lands, and therefore permitted the condemnation as to that tract. If this tract be,
187[16] for the purposes of this action, considered as one of several other tracts of timber for which the railroad is to be built, then it would seem to be manifest that since the petitioner is in the business of logging by railroad and not by water, it could remove its timber in the S. W. ¼ of Section 8 more cheaply by railroad than by water.

While it might be cheaper to log this timber in Section 8, into the river, rather than build the railroad from its present terminus to get this timber alone, yet when it is necessary that the road be built to the north, in order to get Sections 20, 30 and 10, it will become manifest that it would be cheaper for the Logging Company to remove this timber in Section 8 by its road.

The testimony with reference to these features of the case, will be found, for the most part, commencing at page 58 of the
187[17] Statement of Facts, and running throughout to the end of the Statement of Facts.

But the testimony conclusively shows, and the trial court has

found, that in order to remove any of the timber mentioned, except that in Section 8, into the east fork of the Wishkah River, it would be necessary for the Logging Company to cross over lands other than those owned or controlled by itself. In other words, it would be necessary, in order to log Section 30, to cross over about two or three hundred feet of lands belonging to the Weyerhaeuser Timber Company, and in order to log the timber in Section 20, into the river, it would be necessary to cross over Section 19, which belongs to the Weyerhaeuser Timber Company, and in order to log the S. W. ¼ of Section 10, it would be necessary to cross over Section 9, which is owned by the Weyerhaeuser Timber Company. The Log-
187[18] ging Company is, therefore, in no better position, so far as right-of-way is concerned, to log its timber into the water, than it would be to log it down its railroad. In either event, it is bound to cross over lands which it does not own and over which it has no right-of-way. Such being the case, the relators are not in position to say that the Logging Company should remove its timber by putting it into the river, rather than by putting it on its logging railroad. In other words, if we must obtain right-of-way from other owners, in order to log this timber either by railroad or by water, then the question of the most convenient or most practical or most economical way of logging it cannot arise. If we are not permitted to obtain the right-of-way which we are seeking, on the ground that we could log just as economically, or more so, into the river, then likely enough, when we seek to condemn right-of-way across
187[19] the Weyerhaeuser lands, in order to get to the river, that Company will defend on the ground that it would be more economical for us to extend our railroad to the north and take the timber out thereby, and by this process we would be bumped from one action to another indefinitely.

We have our investment in the logging railroad and its equipment, and the more timber we can haul on that railroad, the cheaper the haul will be, and it would seem to be quite absurd that the Logging Company would take any of this timber out by railroad if it could remove the same cheaper down the river.

Error in Refusing to Admit Testimony.

It will be remembered that the northerly terminus of the railroad is now near the center of Section 31, and the relators in the lower court made some effort to show that we could extend the line
187[20] across the N. E. ¼ of Section 31 and into Section 30, and thence on north, for the purpose of getting this timber. The relators in their brief, do not seem to contend that the showing made by them was sufficient to justify the court in holding that we should obtain our right-of-way through the N. E. ¼ of Section 31, but claim that the court committed error in striking certain of their testimony concerning the possible route through Section 31, and in refusing to permit relators to introduce further testimony on that subject. This matter came up in the following way, as shown by the Statement of Facts:

By cross-examination of the Logging Company's witnesses, the relators sought to show that the Logging Company already had a right to go through the N. ½ of Sec. 31, and that it was practicable for the road to be extended northerly through the N. ½ of
187[21] Sec. 31. The Weyerhaeuser Timber Co. owns all of Sec. 31, and when the Manager of the Logging Co. was on the witness stand, he was asked if his company did not have an understanding with the Weyerhaeuser Timber Co., and it was answered that they had never had any difficulty, and when asked if the Logging Co. could not get a right-of-way from the Weyerhaeuser Timber Co., he answered that he presumed they could. (S. F. 45 46.) Thereafter the relators put in some testimony tending to indicate that the road might be extended northerly through the N. ½ of Sec. 31, which lands belonged to the Weyerhaeuser Timber Co., and during the taking of such testimony and while one of relators' witnesses was testifying, he was askel by the relators' attorney, the following question:

"Q. As a matter of feasibility is there any necessity for leaving their own lands and going upon Section 32?

187[22] Mr. Bridges: Objection to the form of the question, saying leaving our own lands.

Mr. Abel: Don't you claim title to 31?

Mr. Bridges: No.

Mr. Abel: You claim you have a right-of-way.

Mr. Bridges: No.

The Court: I have received that impression somewhere. I have been listening to this testimony right along with the belief that you owned Sec. 31.

* * * * * * *

Since it has developed that is not your property it is immaterial about that land.

W. H. Abel: It has only developed from a statement of counsel. We have the sworn statement of the manager in the record on the subject.

The Court: I don't know about that. If you have a right-
187[23] of-way generally over the section, then this testimony is material. If you simply have a right-of-way on the line you are proceeding on, then it is immaterial.

W. H. Abel: We are content with the state of the record upon the matter.

Mr. Bridges: I would like to call Mr. Johnson on that part of our case in chief.

W. H. Abel: Objection to any alteration of the testimony now.

The Court: Objection overruled."

Then Mr. B. F. Johnson, an officer of the Logging Company and its Manager until the past few months, was called, and testified that the Weyerhaeuser Timber Co. owned all of Sec. 31, and gave the following testimony:

"Q. What if any arrangements have you with the Weyerhaeuser people concerning any right-of-way through Sec. 31?

A. We have a verbal agreement with Mr. Weyerhaeuser that when we get our railroad built on that line as designated on the
187[24] Weyerhaeuser map that we are to get a deed for the right-of-way. After the railroad is built we are to agree upon the price. That is the way. That is the only way.

Q. Does that agreement affect the N. ½ of 31?

A. It affects where the road goes across, that is where the survey is made by Mr. Martin.

Q. Is that all of the agreement or arrangement you have with the Weyerhaeuser Timber Company?

A. Yes sir.

Q. And that is a verbal agreement?

A. Yes sir."

The witness further testified that the arrangements with the Weyerhaeusers with reference to Sec. 31, was that the Logging Co. would go across on the line of railroad that had been previously sur-
187[25] veyed out, and when the road was finished the Logging Co. would pay Weyerhaeuser for the right-of-way; that the right-of-way which was in question, was to be in the immediate neighborhood of a railroad right-of-way which had been previously surveyed by some employees of the Weyerhaeuser Timber Co. and being substantially where the road is now constructed. (S. F. 77, 78, 79, 80.)

Following Mr. Johnson's testimony, the following occurred:

"W. H. Abel: I submit, your Honor, they have proved that they have a right-of-way through Sec. 31.

The Court: They have a right to go on this line that is surveyed, that is practically on the line of the Martin survey, but that is all according to his statement." (S. F. 81.)

Then followed the motion of the Logging Company to strike the testimony of the witnesses, and the offer of the relators as set out on pages 15 and 16 of relators' brief.

187[26] It is plain that the reason why the court sustained our motion to strike this testimony and refused to hear other testimony on the same subject, was that since we did not have any right to cross the Weyerhaeuser lands, all testimony concerning a feasible right-of-way across that land, was immaterial, and we submit that the court's ruling in that regard is necessarily right. The relators would have no right to say that we should not cross their lands because there was a feasible route for our railroad across some other land belonging to other people and over which we had no control and no rights-of-way. The testimony was likewise properly stricken out for an additional reason, to-wit: That it did not tend to show that the proposed route through the N. ½ of Sec. 31, was any cheaper or any more feasible or practical, than the route which we were seeking to condemn the right-of-way for; and the
187[27] court's refusal to hear the testimony under the offer made by respondents, as is correctly set out on pages 15 and 16 of relators' brief, was proper, for the further reason that relators offered to prove "that it is entirely feasible to cross Section 31 at a reasonable cost in the building of a logging railroad to run north to Sections

20 and 30 and the S. W. ¼ of Section 10 and the S. W. ¼ of Section 8, all in 19-8." It will be noticed that the offer was to show that the route through the N. ½ of Sec. 31, was a feasible and reasonable route, and not that such route was more feasible or more reasonable than the route through Sec. 32, which we were seeking to condemn. Under no circumstances could the relators seek to make us take some other route over land which we did not own or control, simply because it was a feasible route"; under no circumstances could they require us to take the route through the N. ½ of Sec. 187[28] 31, unless it were shown that such route was more practical and more feasible than the route for which we are seeking to condemn. One man through whose land we are seeking to obtain a right-of-way, cannot answer that there is another equally suitable route through the lands of another man.

It seems perfectly clear to us, that the court's ruling was correct under any theory of the case.

In Sec. 393, Lewis, Eminent Domain, 2d Ed., Vol. 2, p. 891, it is said:

"Fourth, it may be objected that there is no necessity of condemning the particular property, because some other location might be made or other property obtained by agreement. But this objection is unavailing. Except as specially restricted by the Legislature, those invested with the power of eminent domain, for a public purpose, can make their own location according to their own views of 187[29] what is best or expedient, and this discretion cannot be controlled by the courts."

On page 634, Vol. 15, Cyclopedia of Law & Procedure, it is said:

"Under a power conferred by the Legislature the selection by the condemning company of land required for the construction of a railroad, or the location of its depot and other buildings, or the location of its route between certain fixed termini, cannot be controlled by the courts, if such selection is made in good faith, and is not capricious or wantonly injurious, or in some respect beyond the privilege conferred by the charter or statutes; but the grant of the power is never to be extended by unnecessary implication."

See the citation of authorities under each one of the above quotations.

The order of condemnation was perfectly justifiable and should stand.

Respectfully submitted,

BRIDGES & BRUENER,
Attorneys for Respondent Coats-Fordney Logging Co.

188 & 188[1] 12450.

Filed Nov. 16, 1914. C. S. Reinhart, Clerk. F. S. G.

In the Supreme Court of the State of Washington.

No. —.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY and Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

Relators' Reply Brief on Writ of Review.

A. M. Abel, Attorney for Grays Harbor Logging Company.
W. H. Abel, Attorney for W. E. Boeing, Relators.

188[2] In the Supreme Court of the State of Washington.

No. —.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY and Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

Relators' Reply Brief on Writ of Review.

A. M. Abel, Attorney for Grays Harbor Logging Company.
W. H. Abel, Attorney for W. E. Boeing, Relators.

188[3] In the Supreme Court of the State of Washington.

No. —.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY and Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

Relators' Reply Brief on Writ of Review.

Erroneous Exclusion of Testimony.

On respondents' motion, the court struck all our testimony concerning other routes over section 31 as immaterial. (St. 82).

188[4] This testimony commenced on page 65 of the statement. Mr. Shutt, manager of the Grays Harbor Logging Company, testi-

fied he was familiar with the Northeast quarter of 31. (St. 56). He identified a map, (Def. Ex. 2), the dotted lines on which show two routes which we claim the Coats Fordney Company could build through upon (St. 57). They will have to cross one canyon (St. 57). The trestle would be not over four hundred feet long. (St. 58). If the most westerly alleged feasible route was adopted the trestle would be about eight hundred feet long.

Mr. Haymond is a civil engineer. Has experience in railroad construction and with transcontinental railroads. (St. 73). He examined the Northeast quarter of section 31 to determine whether or not it was feasible to build a logging road across into section 30. (St. 74). He made the map. (Def. Ex. 2). (St. 74). The dotted lines indicate where the road might be built. The most easterly alleged feasible route would have a cut with a trestle three
188[5] hundred and sixty or four hundred feet long. (St. 75). The grades on this route compare favorable with the main line grades of the Coats Fordney Logging railroad (St. 76). On the westerly proposed route the trestle would be about eight hundred and fifty feet long. (St. 76). The easterly proposed route would cost $7,000 or $8,000. (St. 77). Upon the other proposed route the road would cost $9,500, including steel and all. These proposed routes would be about a mile long. (St. 77).

This testimony tended to show the cost of building the road across the Northeast quarter of 31, to be much less than to go through our lands. We ask the court to read the testimony of Ray Johnson, the engineer for the Coats Fordney Company, and compare it with the Haymond testimony, which was stricken.

After Haymond's testimony had been given Mr. Bridges, on behalf of the Coats Fordney Company, disclaimed the right to cross the Northeast quarter of section 31 (St. 77). Before this W. L. Stout, the Coats Fordney manager had testified:

188[6] "Q. The Coats Fordney Logging Co. have an understanding with the Weyerhaeuser Timber Co.

A. We never had any difficulty.
(St. 45).

Q. You can get it upon mere request?
A. I presume so."
(St. 46).

Thereupon, the Coats Fordney Company was allowed to reopen the case in chief, and Mr. Johnson, their former manager, testified. (See St. 78-81). This testimony shows the Weyerhaeuser Timber Company was not particular where the Coats Fordney Company crossed section 31. No definite location of the road was agreed on. The Weyerhaeuser Company had previously made a survey (see testimony Mr. Martin, and map); but this was not adopted by the Coats Fordney Company, who made a survey for itself, and the routes are not coincident. Johnson testified on the subject of negotiations with the Weyerhaeuser Timber Company:

"Q. What was said by you and what was said by him?
188[7] A. We asked him to go into section 31.
Q. Where was the road at that time?
A. That was in section 12.
Q. What did you say to him?
A. We told him we were desirous of going through there.
Q. Where?
A. Going through 31, what we are talking about.
Q. 31-19-8?
A. I suppose. Well, he says, 'That is right. Go through there.' To get that timber out in the north we had a lot of timber in there at that time and we told him also we wanted to build a headquarters there and didn't know how much land we would take and he says, 'Go right ahead and when the road is finished we will agree to give you a right of way through there on a price we can agree on.
Q. The relations of the Coats Fordney Logging Co. and the Weyerhaeuser Timber Co. are close, friendly, and confidential?
A. We are friendly, yes.
188[8] Q. The Coats Fordney Logging Co. had never had any difficulty in getting a right of way that it has wanted through any of the Weyerhaeuser Timber Co.'s lands? (St. 80).
A. That is the first we have wanted. We did not have any trouble.
Q. You were told to go ahead?
A. Yes, sir.
Q. The Coats Fordney Logging Co. was to decide where it would build through section 31?
A. Yes, sir.
Q. There has been no payment of the price yet?
A. Yes, sir.
Q. The price has not yet been fixed?
A. No sir.
Q. It just depends on where the railroad is built and the amount of land taken?
A. The amount of land taken for headquarters.
Q. You don't think you will have any difficulty in settling with the Weyerhaeuser Timber Co. when you finally get together?
188[9] A. I don't think so. I have no reason to think so."
(St. 81.)

Thereupon, Mr. Bridges moved to strike all the testimony of our witnesses concerning these other routes across section 31, as immaterial, which was granted and exception saved to us. (St. 82.)

We are told that our offer to show by numerous witnesses, that it was entirely feasible to cross section 31 at reasonable cost, and hence avoid our land (St. 81), did not involve showing that it would be cheaper. But this had already been shown by the testimony of Mr. Haymond, which was stricken. He testified, as above shown, to two routes, each about a mile in length, the cost of one $7,000 or $8,000, including steel and all, the other costing about $9,500. The testimony of Ray Johnson, engineer for the Coats Fordney Company, shows a cost by their proposed route of a dollar a lineal foot. (St.

14.) Hence, the testimony, which was stricken, showed two
188[10] cheaper routes across the Northeast quarter of section 31. Also the offer to prove by seven witnesses that it was entirely feasible to cross section 31 at reasonable cost with logging railroad, in connection with the stricken testimony of Haymond, should have been received.

The evidence fairly shows permission by the Weyerhaeuser Timber Company to cross section 31, the location of the road to be fixed by the Coats Fordney Logging Company. But on the theory that the Coats Fordney Company had no right to cross there, the trial court ruled out our evidence and refused our offer. The court's action was erroneous even on the assumption that the Coats Fordney Company had no right to cross the Northeast quarter of section 31.

While we recognize that a public service railroad can exercise a reasonable discretion in the selection of a route, and that ordinarily the court will not disturb such selection, the rule does not apply where a mere private logging road right of way is sought to
188[11] be acquired. To so hold, involves the assumption that it is entirely optional with the petitioner where the private way of necessity he seeks shall be located. There is a dearth of decisions on this point, however, owing, we think, to the fact that substantially all of the states decline to recognize the right to condemn for a strictly private way of necessity. We have dealt with the constitutional phases of this question elsewhere.

Omitting at this time consideration of the constitutional question, and assuming that a private way of necessity can be acquired under the right of eminent domain, yet, even then, the word "necessity" means a reasonable necessity. In determining what is a reasonable necessity, the landowner should be permitted to show the existing conditions—that it is not necessary to cross his land at all. If he cannot show this, then his entire holdings may be criss-crossed by private ways of necessity, which are not necessary at all, which are for the convenience, but not the necessity of adjacent owners.
188[12] The court's holding in effect was that we could not show a lack of necessity to condemn a right of way across our land.

The testimony of Haymond, our engineer, went directly to the cheapness and feasibility of two proposed routes across the Northeast quarter of 31, thus making the road a mile shorter. This testimony was stricken, and, with the offer which was refused, showed a shorter, cheaper and better route. These matters were competent and relevant on the question of necessity.

The case of Pasadena vs. Stimson, 91 Cal. 238 is exactly in point and was quoted approvingly in State ex rel. Postal Tel. Co. vs. Superior Court, 64 Wash. 196. There the court refused an offer of testimony showing that the route selected was not so good as one that might have been selected. The decree of condemnation was reversed because the court denied the offer. The court said:

"We think the court erred also in excluding the testimony
188[13] of Gervaise Purcell. It would certainly have tended to prove that the route selected for the proposed sewer was not so good as one that might have been selected, and that it would cause

a greater private injury. The offered testimony was to the effect that the witness had surveyed a route 1,432 feet shorter than that proposed, upon a better grade, through lands not thickly settled. We do not say that this testimony would have been conclusive, but it was competent and relevant to a material issue in the case, and should have been admitted, subject to the right of the plaintiff to introduce evidence in rebuttal."

The Coats-Fordney Company, a private logging road, is not entitled to any greater consideration at least than a public service corporation.

This court has several times considered the question.

In State ex rel. Postal Telegraph Co. vs. Superior Court, 64 Wash. 189, this court recognized evidence that the lands selected were not reasonably necessary, and that a slight change of location would equally meet the necessity and do less damage to the owner, and said:

188[14] "Plainly, the selection by the condemnor is evidence of the highest character that the land selected is necessary for the enterprise, and in the absence of clear and convincing evidence to the contrary, it conclusively established the necessity. It is sufficient to make a strong prima facie case, but when convincing evidence is adduced by the owner that the land sought is not reasonably necessary, and that a slight change of location to other of his land will equally meet the necessity of the taker and be of much less damage to the owner, then it is incumbent upon the taker to rebut such evidence, since the refusal to make such change, if unexplained would amount to oppression and be an abuse of the power. In re Field, 61 App. Div. 618, 70 N. Y. Supp. 677."

Counsel cites Lewis on Eminent Domain, that the land owner cannot show that there is another available route. This court has taken the opposite view in State ex rel. Spokane vs. Superior Court, 40 Wash. 389, where condemnation was refused because there was another available route.

In Seattle & Montana Ry. Co. vs. State, 7 Wash. 150, it was held that the question of necessity of the particular route was to be determined by the court upon competent proof. Certainly this

188[15] involved hearing the landowner's testimony as well as the testimony of the railroad company.

We submit the general rule is as stated in State ex rel. vs. Superior Court, 64 Wash. 594 in 5 Ency. Evid. 172:

"It is not essential that the party seeking to condemn prove that no other property obtainable would be sufficient for the contemplated use. Proof that the particular property in question is reasonable required for the purpose of the contemplated improvement is prima facie sufficient. In the absence of proof to the contrary, the fact that the party seeking to condemn has selected the particular land is sufficient proof of the necessity for the taking thereof."

Counsel's argument cites the court's finding that it was necessary to cross our lands, and that there was no other available route. Since the trial court struck our evidence of another available route and

refused our offer on that subject, the finding should not stand. The finding might have been different if the court had heard our side.

188[16] Southwest Quarter of Section 8.

Under no circumstances should the decree stand as to the timber upon this quarter section. The trial court made a finding that no necessity existed for condemning a right of way to remove the timber therefrom if it is considered as a tract separate from the other lands of petitioner.

It is, in fact, a tract separate from the other tracts, distant from the others one or more miles.

Appellant argues that if its road is built it can remove all of its timber more cheaply by rail. This we do not admit; but, even so, the undisputed evidence shows that the timber from the Southwest quarter of Section 8 can be removed cheapest by water. The east fork of the Wishkah River is navigable, and flows through the land. No necessity exists at all for a private way of necessity to remove this timber.

Respondent argues on the assumption that it should be permitted to condemn a right of way to remove timber, because a few
188[17] miles farther south it has a logging railroad with full equipment. But the right to condemn does not depend on this fact. Its right to condemn is based only on an alleged lack of private way to remove its timber; and not on any necessity for the use of a logging railroad and equipment some miles distant. The statute does not undertake to grant a right to condemn to a logging railroad as such. It merely allows the owner of land who wishes to remove his timber a way to market. And in determining the right to a private way of necessity, the ownership of a present logging railroad does not aid, nor supplement, the right, nor add to the necessity.

As soon as it appeared that the Coats-Fordney Logging Company had a navigable waterway whereby to remove its timber from this quarter section, the right to condemn should have been promptly denied. That right is not increased by showing that it has timber a mile distant, which it expects to log by rail. The statute under which the right to condemn is claimed, does not warrant a
188[18] right of way where one already exists. The necessity is totally lacking.

In Wisconsin Central Ry. Co. vs. Kneale, 48 N. W. 248 (Wis.) the landowner was permitted to show that the railroad company, who sought to condemn a gravel pit, could obtain gravel from other places.

We invite the court's attention to the case of Corea vs. Higuera, 17 L. R. A. n. s. 1018 (Cal.) and the note on the point that there is no way of necessity where other possible modes of access exist.

Lewis, Eminent Domain (3d Ed.) 260, says, on the subject of private way of necessity:

"One cannot be laid out simply because it will be more convenient or less expensive for the applicant, than one on his own land."

4 Words & Phrases (2nd. series) 1263, defines right of way of necessity:

"A right of way from necessity must be in fact what the term naturally imports, and cannot exist, except in cases of strict necessity."

188[19] Kentucky is one of the states which recognized that a private way of necessity may be acquired by eminent domain proceedings. Yet, such private ways are semi-public in that state, and are usable at the will of the public. Yet, the Kentucky cases hold that the applicant is not entitled to a passageway over the lands of the defendants for his mere convenience; there must be a practical necessity, not convenience, is the test. If there is a way by which the applicant can lawfully reach his farm, a case of necessity does not exist.

Gaines vs. Lunsford, 47 S. E. 967 (Ga.).
Chattanooga vs. Philpot, 37 S. E. 181 (Ga.).
Turnbull vs. Rivers, 15 Am. Dec. 622 (S. Car.).

A way of necessity never exists where a man can get to his own property through his own land, however inconvenient the way to his land may be.

Dee vs. King, 50 Atl. 1109 (Vt.).
Shake vs. Frazer, 21 S. W. 583 (Ky.).

188[20] The Constitutional Question.

In support of the view taken that the private way of necessity statute violates the fourteenth amendment to the Federal Constitution, and is hence void, these relators submit the following additional cases and arguments:

The argument in our main brief was that the right of eminent domain, which is inherent in sovereignty, is the right to take private property for public use. The right is based upon the Roman maxim: salus populi suprema lex. The good of the people is the supreme law. It is embodied in that provision in Magna Charta that no man shall be dispossessed of his life, liberty or process, save by a judgment of his peers, or the law of the land.

In Cooley's Blackstone, (Vol. 1, 3d. Ed.), 138, the inherent right of private property is discussed and recognized. Cooley's note to the text holds that it is well settled that the government has no right to take the property of one citizen and transfer it to another, even for full compensation.

188[21] Cooley, Const. Lim., (7th Ed.), Sec. 764, et seq., discusses the unconstitutionality of private way statutes and concludes that:

"It is conceded on all hands that the legislature has no power in any case to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit."

The right of eminent domain, it has been said, does not imply a right in the sovereignty to take the property of one citizen and trans-

fer it to another, even for a full compensation, where the public will be in no way promoted by such transfer.

1 Lewis, Eminent Domain (3d. Ed.) 520, on the subject of private way for private use, says:

"It has never, we think, been decided in any case that private property could be condemned for a private road for the exclusive use of the applicant, and we know of no principle upon which such a proceeding can be justified."

188[22] The following cases hold that a private way of necessity cannot be obtained by eminent domain proceedings.

Beaudrot vs. Murphy, 30 S. E. 825 (S. Car.).
Bradley vs. Pharr, 19 L. R. A. 647 La. Ann.
Varner vs. Martin, 21 W. Va. 534.

In Bloodgood vs. M. & H. R. R. Co., 18 Wend. 58, in considering the limitations upon the power of eminent domain, cited: Burlemaque, Principles of Law, 145, Grotius, Boecler and Bynkerschoeck, to the effect that the right of eminent domain is not to be exercised, "Except in cases where it is absolutely necessary for the public good."

De Vattel's Law of Nations, 112, discusses the subject of eminent domain in connection with private property and says:

"The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the eminent domain."

Chesapeake vs. Moreland, 104 S. W. 764 (Ky.).
Hench vs. Pritt, 57 S. E. 808 (W. Va.).

188[23] Thus, in Wisconsin, a strictly private drainage statute is unconstitutional, although a statute authorizing a drainage system for the public good has been upheld.

In re: Schubert, 114 N. W. 244 (Wis.).

So, in Nebraska, a law providing for drainage districts "whenever it will be conducive to the public health, convenience or welfare," held not to authorize formation of drainage district in furtherance of private interest.

State ex rel. Harris vs. Hanson, 115 N. W. 294 (Neb.).

So, a grist mill which does not serve the public, but is strictly private, cannot exercise the power of eminent domain.

Howard Mills Co. vs. Schwartz Lbr. Co., 95 Pac. 559 (Kans.).

Taking of land of one person either through taxation or eminent domain for the purpose of giving it to another is not for public purposes and is contrary to the basic and essential principles of free government.

Salisbury, 102 N. E. 619 (Mass.).

188[24] Private property can be condemned only for public use and the legislature cannot otherwise provide, nor make provision for just compensation.

Philadelphia Clay Co., 88 Atl. 487 (Pa.).

In those states which have sustained private way of necessity statutes, the decisions have been based either:

First. On the ground that the way is actually for public use, and usable by the public. Of this class are the following cases:

Madera County vs. Raymond, 72 Pac. 915 (Cal.).
Sherman vs. Buick, 32 Cal. 242.
Latah vs. Peterson, 16 L. R. A. 81 (Idaho.)

Second. Where the private way is for the individual to pass to perform some public duty, as: To attend a jury duty; to go to school, etc.

Shake vs. Nazer, 21 S. W. 583 (Ky.).
Robinson vs. Swope, 12 Bush 21 (Ky.).

188[25] No claim is made that the logging road sought to be built will serve any public purpose. It will be strictly private for the company's private use. The way could not be used by the public generally.

An unsuccessful attempt has been made on one occasion to amend our constitution so as to give the private logging roads the right to condemn. One of these proposed amendments is found in Session Laws, 1905, 124.

The defeat of these proposed amendments at the polls shows the state policy to be opposed to the alleged right sought to be exercised in this case. No public good, public interest, nor public use is served by the act, nor by its exercise.

Finally we submit that to take private property for private use is an unwarranted extension of a sovereign right, an arbitrary invasion of the right to private property. It was held in Detroit vs. Parker, 181 U. S. 401:

"The 14th amendment to the federal constitution operates to extend to the citizens and residents of the states the same protection of arbitrary state legislation affecting life, liberty and property
188[26] as is afforded by the 5th amendment against similar legislation by Congress."

For the reasons given the proceeding should be dismissed. In any event, should be reversed.

Respectfully submitted,

A. M. ABEL,
Attorney for Grays Harbor Logging Company.
W. H. ABEL,
Attorney for W. E. Boeing.

188[27] STATE OF WASHINGTON,
County of Chehalis, ss:

E. M. Whelen, being first duly sworn, on oath, deposes and says: That she served the within brief on respondents, by mailing three copies thereof, on November 14, 1914, addressed to respondents' attorneys: Bridges & Bruener, Aberdeen, Wash., in an envelope securely fastened, postage prepaid. That there is daily mail communication between the cities of Aberdeen, Wash. and Montesano, Wash.

E. M. WHELAN.

Subscribed and sworn to before me this 14th day of November, 1914.

W. H. ABEL,
Notary Public for the State of Washington,
Residing at Montesano, W'n.

189 In the Supreme Court of the State of Washington.

No. 12450.

STATE OF WASHINGTON on Relation of GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY and Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

Writ of Review.

Filed Nov. 11, 1914. C. S. Reinhart, Clerk. F. S. G.

State of Washington to Superior Court of Washington for Chehalis County, Honorable Mason Irwin, Judge thereof, and Coats-Fordney Logging Company:

In the Name of the State of Washington you are hereby directed to certify fully unto this court all the records and proceedings in that certain action brought in the superior court of Washington for Chehalis county, wherein the Coats-Fordney Logging Company is petitioner, and Grays Harbor Logging Company and W. E. Boeing are respondents, the same being cause No. 11820 of the files of the said superior court, and therewith certify a full, complete and true copy of the judgment roll of said cause, including the petition, the demurrer of the respondents therein, the order overruling said demurrer, the answers of the several respondents, the findings of fact and conclusions of law made by the court, the decree of said court, the proposed findings of fact requested by the respondents and each of them, the exceptions taken by each of said respondents to the findings of fact, conclusions of law, decree and refusal to make proposed findings of fact, and the statement of facts, containing the testimony taken at the hearing of said cause. Said record to be filed in this court on or before the 13th day of November, 1914, and the brief of the relators to be filed and served in this court on or before
190 Nov. 3d, 1914, and the answer brief of the respondents to be filed in this court within 10 days thereafter.

It is further ordered that pending the determination hereof in this court, the said respondents, superior court of Washington, for Chehalis County, Honorable Mason Irwin, Judge thereof, and said Coats-Fordney Logging Company desist from all further proceedings in said cause to be reviewed.

Dated in open court this 23d day of October, 1914.

FULLERTON,
Chief Justice, Acting.

[SEAL.]

Attest:

C. S. REINHART, *Clerk.*

191 12450.

Articles of Incorporation of "Coats-Fordney Logging Company."

Know all men by these presents, That we, the undersigned, being citizens of the United States, desiring to associate ourselves together for the purpose of forming a corporation under the laws of the state of Washington, with relation to private corporations, do hereby make, execute and acknowledge in triplicate, the following Articles of Incorporation:

Article One.

The name of this company shall be and is "Coats-Fordney Logging Company."

Article Two.

The objects and purposes for which this corporation is formed, are as follows:

To carry on the business of buying, selling, trading and generally dealing in timber and timber lands of all kinds and character.

To own, operate, and in all manners and ways become interested in, conduct and carry on the logging business.

To purchase, own, acquire, lease and in all manners and ways become interested in all manner and kind of lands, tenements and hereditaments.

To own, purchase, lease or otherwise become interested in any and all manner and kinds of logging engines, logging chutes, logging railroads, and logging equipment, and all manner and kind of machinery, tools, implements and appliances proper or necessary to carry on a general logging business.

To own, purchase, and generally trade and deal in saw logs and other timber products.

Filed Nov. 11, 1914. C. S. Reinhart, Clerk. F. S. G.

192 To own, purchase, lease and in all manners acquire and become interested in and carry on and operate saw mills and saw mill business, shingle mills and the business of manufacturing lumber and shingles, and the manufacture of all manner and kind of wooden articles, tools and implements, and generally to carry on any and all kinds of manufacturing business and to do whatever may be thought proper or necessary for the successful carrying on of any logging business, saw mill business, shingle mill business, or manufacturing business.

To construct, equip, maintain and operate, and to own, control or in any wise become interested in all manner and kind of logging railroads, and to do a general logging business by means of such logging railroads.

To own, construct or otherwise become interested in any private water rights or boom rights proper or necessary in the successful carrying on of the affairs of the corporation.

To construct buildings upon any of its lands or properties or otherwise and to in any manner improve any of its property or other property.

To engage in the business of mining of any kind or character whatsoever, and to own, purchase, lease or otherwise acquire any and all kinds of mining rights, mining property, mines, and mining machinery tools and implements, and to deal in all kinds of mining supplies, and to own, construct, or otherwise become interested in any railroads proper or necessary for the purpose of carrying on such mining business.

To build, construct, charter or otherwise become interested in any and all kinds of steam vessels, sailing vessels, boats, barges, scows and floating crafts, and to operate the same either in connection with its other business or wholly independent thereof.

To do a general mercantile business, either in connection with its other business or wholly independent thereof, and to deal in any and all kinds of merchandise, tools, implements, appliances and machinery.

To own, purchase, lease, or in any manner acquire, control, become interested in or operate any and all kinds of water
193 power, and to develop such water power, and by means thereof to develop all kinds of power and to sell the same, and generally to deal in all kinds of water power and water energy, and to construct and operate and in any wise become interested in all manner and kinds of dams for the purpose of storing water, or for other purpose.

To engage in the business of buying and selling farm lands and logged off lands, and the business of clearing such lands.

To construct, maintain and operate or in any wise acquire and become interested in telephone and telegraph lines for private use in connection with the business and affairs of the company.

To purchase, acquire, own, handle and deal in any and all kinds of goods, wares and merchandise, and to carry on a general mercantile business.

To borrow money upon bonds, notes, mortgages or otherwise, and to issue bonds and debentures, and to mortgage and hypothecate any and all of its property to secure the payment of such loans or of any indebtedness.

To consolidate, merge or unite with any other corporation or corporations.

To become interested in, own or control the capital stock of any other corporation whatsoever.

To do any and all things proper or necessary in the orderly conduct of the business of the company, and generally to have and exercise any and all of the powers which may be granted to any private corporation under the laws of the state of Washington.

Article Three.

The capital stock of this company is hereby fixed at the sum of one million ($1,000,000) dollars, divided into ten thousand (10,000) shares, each share of the par value of one hundred ($100) dollars.

Article Four.

The principal place of business of this corporation shall be the city of Aberdeen, in the county of Chehalis, and state of Washington.

Article Five.

The time of the existence of this corporation shall be fifty
194 (50) years immediately following the filing of these articles of incorporation, unless the same be sooner dissolved as provided by law.

Article Six.

The number of the Trustees of this corporation shall be five (5) and the following named persons, to-wit:

A. F. Coats, of Seattle, Washington, B. F. Johnston, of Aberdeen, Washington, John C. Hicks and Coleman C. Vaughan, of St. Johns, Michigan, and Joseph W. Fordney, of Saginaw, Michigan, are hereby made, constituted and appointed the trustees of this company, for the period of six (6) months, immediately following the organization of the company, to manage and control the affairs of the company.

In witness whereof, we have hereunto set our hands and seals on this 23rd day of September, 1910.

A. F. COATS.
B. F. JOHNSON.
JOSEPH W. FORDNEY.
JOHN C. HICKS.

STATE OF WASHINGTON,
County of Chehalis, ss:

Be it remembered, That on this 23rd day of September, 1910, before me, a notary public in and for the state of Washington, residing at Aberdeen, personally appeared Joseph W. Fordney, John C. Hicks, A. F. Coats and B. F. Johnston, who are to me well known to be the same persons described in and who executed the foregoing articles of incorporation, and they acknowledged to me that they signed and sealed the same, in triplicate, for the uses and purposes therein mentioned, and freely and voluntarily.

In witness whereof, I have hereunto set my hand and affixed my official seal on the day and year first above written.

[Seal J. B. Bridges, Notary Public, State of Washington.]

J. B. BRIDGES,
Notary Public in and for the State of Washington,
Residing at Aberdeen.

Commission expires Sep. 28, 1913.

Filed this 23" day of Sept. 1910 at 2 o'clock and — min-
195 utes P. M. at the request of Bridges & Bruener. Fred Rosmond, County Auditor. Ethel Baker, Deputy.

STATE OF WASHINGTON,
County of Chehalis, ss:

I, R. G. Trask, Auditor of Chehalis County, State of Washington, do hereby certify that the annexed and foregoing instrument is a true and correct copy of Articles of Incorporation of the Coats-Fordney Logging Co., and that I have carefully compared said copy with the original and find it to be the whole and every part thereof.

Witness my hand and official seal this tenth day of November, 1914.

[SEAL.]

R. G. TRASK,
County Auditor,
By W. D. CAMPBELL, *Deputy.*

Filed Dec. 11, 1914.

Department Two.

196 No. 12450.

THE STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY et al., Relators,
v.
SUPERIOR COURT FOR CHEHALIS COUNTY et al., Respondents.

The purpose of this action was to acquire by condemnation a private way of necessity. After a hearing the trial court entered a judgment sustaining the right to condemn. To review this judgment the cause is brought here by certiorari.

The facts are substantially as follows: The relators are the owners of the N. W. ¼ of Sec. 32, Twp. 19 N., R. 4 W. W. M. in Chehalis county, Wash. The respondent, Coats-Fordney Logging Co. is the owner of sections 30 and 20, the S. W. ¼ of Sec. 10, and the S. W. ¼ of Sec. 8, in the same township. The Weyerhaeuser Timber Co. is the owner of Sec. 31, likewise in the same township. The lands of the Coats-Fordney Logging Co. have upon them large quantities of valuable timber, all of which lands and timber lie to the north of the N. W. ¼ of Sec. 32, owned by the relators. For some years the Coats-Fordney Logging Co. had been engaged somewhat extensively in the business of logging. In the prosecution of this business it has constructed a logging railroad, now about 6½ miles in length. The lower terminus of this logging road is at tide-water in the Wishkah river. This river flows, generally speaking, in a southwesterly direction. Some miles to the east, or southeast of it the Wynochee river flows in the same general direction. The logging railroad constructed by the Coats-Fordney Logging Co. follows the divide or crown of the ridge between these two rivers. The upper terminus of the road is now at some point in the S. ½ of Sec. 31,
197 which is owned by the Weyerhaeuser Timber Co. By this condemnation the Coats-Fordney Logging Co. desires to extend its road across the N. W. ¼ of Sec. 32, owned by the relators, and thence in a generally northeasterly direction, for the

purpose of logging from the lands above mentioned owned by it. The S. W. ¼ of Sec. 8, owned by the Coats-Fordney Logging Co. is adjacent to the east fork of the Wishkah river. This is a navigable river for the purpose of floating logs to tide-water. None of the other lands owned by the Coats-Fordney Logging Co. are upon the river.

Upon the trial the relators contended, that instead of following the divide and passing through the N. W. ¼ of Sec. 32, there was a feasible route over which a road could be constructed at a reasonable cost across the N. ½ of Sec. 31 directly into Sec. 30, and thus avoid crossing the relators' land.

There are three questions in this case: 1. Was a way across the N. ½ of Sec. 31 sufficiently practicable and available to the Coats-Fordney Logging Co. to deny it the right to condemn a way of necessity across the land of the relators? 2. Was the fact that the S. W. ¼ of Sec. 8 was upon the east fork of the Wishkah river a sufficient reason to deny the right of condemnation so far as it pertained to reaching that particular tract of timber? And 3. Does the law which gives the right to condemn a private way of necessity offend against the due process of law clause found in the 14th amendment to the Federal Constitution?

I. The relators claim that instead of seeking to condemn across their land, the N. W. ¼ of Sec. 32. that the road should be extended north through the N. ½ of Sec. 31. As appears from the facts stated, this latter section was not owned by the Coats-Fordney Logging Co. Upon the trial the relators offered evidence to show "that it is entirely feasible to cross section 31 at a reasonable cost in the building of a logging railroad, to run north to section- 20 and 30 and the S. W. ¼ of Sec. 10 and the S. W. ¼ of Sec. (8),
198 all in 19-8." This evidence the trial court declined to receive. This it is claimed was error.

The general rule is, that where a public service corporation is seeking to condemn land, that those invested with the power of eminent domain have the right in the first instance to select the land which, according to their own views, is most expedient for the enterprise, but that the court is invested with power to determine whether specific land proposed to be taken is necessary, in view of the general location, and to finally determine the question of necessity for taking such specific land when there is evidence of bad faith or oppression or an abuse of power in the selection. In order to overcome the prima facie case made by the condemnors, it is necessary to show by clear and convincing evidence that in the selection of the proposed route there was bad faith, oppression, or an abuse of power. In State, ex rel. Postal etc. Co. v. Superior Court, 64 Wash. 189, it was said:

"We believe that the correct construction of this statute is that those invested with the power of eminent domain have the right in the first instance to select the land which, according to their own views, is most expedient for the enterprise, and that it invests the court with the power to determine whether specific land proposed to be taken is necessary in view of the general location, and to

finally determine the question of necessity for the taking of such specific land when there is evidence of bad faith, or oppression, or of an abuse of the power in the selection. Plainly, the selection by the condemnor is evidence of the highest character that the land selected is necessary for the enterprise, and in the absence of clear and convincing evidence to the contrary, it conclusively established the necessity. It is sufficient to make a strong prima facie case, but when convincing evidence is adduced by the owner that the land sought is not reasonably necessary, and that a slight change of location to other of his land will equally meet the necessity of the taker and be of much less damage to the owner, then it is incumbent upon the taker to rebut such evidence, since the refusal to make such change, if unexplained would amount to oppression and be an abuse of the power. In re Field, 61 App. Div. 618, 70 N. Y. Supp. 677."

The necessity being first shown, there seems no good reason why the rule of that case should not apply when the purpose of the condemnation is to acquire a private way of necessity. The reasons which support the rule in the one case would also seem to support it in the other. The respondents claim that that case is in-
199 applicable, because there the question was the change of route over the same owner's land, while here the proposed different route is over the land of an owner not a party to the proceeding. It will be assumed but not decided that the rule is applicable when the proposed change of route would cross the land of a third party. The question then arises, should the evidence offered and rejected have been received. The evidence offered went no further than that the route over the north half of Sec. 31 was feasible, and that the road could be constructed there at a reasonable cost. This fell short of meeting the requirements of the rule. In order to justify the court in ordering the change of location of the proposed road, it was necessary to show, not only another route which was practicable and that the road could be constructed thereon at reasonable cost, but it was necessary to go further and show by clear and convincing evidence that in the selection of the route sought to be condemned there was bad faith, oppression, or an abuse of power. The evidence offered does not go to the extent of showing that the route selected by the condemnor causes unnecessary damage to the relators' property, and that the route over Sec. 31 would cause much less damage to that property than would the route selected cause to the relators' property.

But the relators claim that the respondents had a right by private agreement with the Weyerhaeuser Timber Co. to cross the N. ½ of Sec. 31. But we think the evidence does not go this far. It is true that one of the officers for the respondent company admitted that it had acquired the right through the S. ½ of Sec. 31 from the Weyerhaeuser Timber Co. without any difficulty, and that he presumed if they desired it that they could acquire a route through the N. ½ thereof. The route which they had already acquired through the S. ½ of that section was the one which when extended would cross the N. W. ¼ of Sec. 32. If a route were

acquired across the N. ½ of Sec. 31 it would be the result of future negotiations.

200 II. If the S. W. ¼ of Sec. 8 which borders upon the east fork of the Wishkah river was the only property to be reached by the proposed road, it might well be held that there was not a sufficient reason to justify the condemnation of a private way of necessity for a logging road, since from that particular tract there is an adequate outlet by water. The statute provides that when land is so situated with respect to other land that it is "necessary for its proper use and enjoyment to have a private way of necessity," the right of condemnation exists.

Laws of 1913, Chap. 133, p. 412.

The word "necessary" as used in the statute means reasonable necessity.

Samish River Boom Co. v. Union Boom Co., 32 Wash. 586.
State, ex rel. M. Timber Co. v. Superior Ct., 77 Wash. 585.

In determining whether a reasonable necessity exists for the condemnation, it is necessary to look at the entire enterprise rather than to its segregated parts. The Coats-Fordney Logging Co. was conducting its logging operations by means of a logging railroad. To log in this manner it was already equipped. Only one of the four tracts of land which it was seeking to reach was located upon the river. To sustain the right to condemn so far as it pertained to reaching the other three tracts of land and to deny it as to this one would not seem very reasonable. The S. W. ¼ of Sec. 8 was only one of the ten quarter sections included in the enterprise.

III. The relators' brief shows an exhaustive and painstaking investigation into the question as to whether the state statute giving the right to condemn for a private way of necessity offends against the due process of law clause in the 14th amendment to the Federal constitution. Were the question an open one in this state, it would present an interesting problem. In State, ex rel. Mountain Timber Co. v. Superior Court, 77 Wash. 585, supra, it was expressly held that the statute giving the right to condemn a private way of necessity was not incompatible with due process of law as guaranteed by the Federal constitution. That case was heard en banc, and the opinion was concurred in by all members of the court. The question is at rest so far as this court may be concerned.

201

The judgment will be affirmed.

MAIN, *J.*

We concur:
CROW, *C. J.*
MOUNT, *J.*
ELLIS, *J.*
FULLERTON, *J.*

202 12450.

Filed Jan. 9, 1915. C. S. Reinhart, Clerk. F. S. G.

In the Supreme Court of the State of Washington.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY, and Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

Petition for Rehearing.

The Grays Harbor Logging Company and W. E. Boeing, relators herein, respectfully petition the court to grant a rehearing in this cause and submit in support thereof the following:

Southwest Quarter of Section Eight.

The east fork of the Wishkah river flows through this tract. If the Coats-Fordney Logging railroad is built, as proposed, it will be about a mile from the railroad to this land, with the river intervening. There is really no testimony that this tract would ever be logged by rail. The trial court held that, considering it as a separate tract, no necessity exists for furnishing a right of way to log the timber therefrom.

This court, in its opinion, discusses the meaning of "reasonable necessity" and holds that a reasonable necessity exists for logging the timber from this tract by rail. When one adequate public way exists, how can there be a reasonable, or any, necessity, for another way? Particularly is this true where the other way will be about a mile from the land.

The right to condemn for private way is of necessity granted by the statute (assuming its validity) to the owners of lands,
203 not to the owners of logging railroads. The foundation of the right is the ownership of land which lacks a way out whereby to remove the products of that land.

The Constitutional Question.

The application the court has made of the statute to justify the taking a right of way where a public way already exists, shows the danger of allowing a statute of this kind to stand as constitutional. As construed by this court, private property can be taken for a private way, not of necessity, but of alleged convenience, although there is a public way across the land at present. As construed by this court, the statute is one which authorizes the taking of private property for the private convenience of others. We believe the decision of the court stands alone in sustaining as constitutional such a proceeding.

We again urge a reconsideration of the point made, that the statute is in conflict with the federal constitution, and that the proceeding is one where our property is sought to be taken without due process of law for the private convenience of a private concern.

For these reasons, and for the reasons given in our opening and reply briefs, we respectfully request the court to grant a rehearing and reverse the decree under review.

Respectfully submitted,

A. M. ABEL,
Attorney for Grays Harbor Logging Company.
W. H. ABEL,
Attorney for W. E. Boeing.

204 12450.

In the Supreme Court of the State of Washington.

Filed Jan. 30, 1915. C. S. Reinhart, Clerk.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,
vs.
SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY and Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

Brief in Support of Petition for Rehearing.

This court, in State ex rel. Mountain Timber Co. vs. Superior Court, 77 Wash. 592, said:

"The taking of private property for private use for the promotion of the general welfare, upon due notice and hearing and the payment of compensation, is not incompatible with the process of law, as guaranteed by the Federal constitution.
Head vs. Amoskeag Mfg. Co., 113 U. S. 9."

Again, in deciding the case at bar the court said:

"III. The relators' brief shows an exhaustive and painstaking investigation into the question as to whether the state statute giving the right to condemn for a private way of necessity offends against the due process of law clause in the 14th amendment to the Federal Constitution. Were the question an open one in this state, it would present an interesting problem. In State ex rel. Mountain Timber Co. v. Superior Court, supra, it was expressly held that the statute giving the right to condemn a private way of necessity was not incompatible with due process of law as guaranteed by the Federal constitution. That case was heard en banc, and the opinion was concurred in by all members of the court. The question is at rest so far as this court may be concerned."

205 The foregoing excerpts contain the only statements made by this court on the question of the supposed conflict of the

right-of-way necessity statute and the fourteenth amendment of the federal constitution. In our original brief we call attention to the case of Head v. Amoskeag Mfg. Co., and argued that the reference above set out, to that case, was based on a misapprehension of what was therein decided. The proceeding in Head vs. Amoskeag was based on a public use statute, under which dam sites could be condemned; a hearing was provided before a committee; this committee had to make a finding of public use; a review court proceeding was provided for; upon such review the court had to pass upon the question of public use; if the court decided such question in the negative the proceeding failed. The case is not an authority, and does not decide, that private property may be taken for purely private purposes by eminent domain proceedings.

Feeling that the decision in the Mountain Timber Company case, and in the case at bar, are legally two steps in the alteration of our state constitution, and an expansion of the power of eminent domain in violation of the due process of law clause contained in the fourteenth amendment to the federal constitution, we respectfully submit for consideration the following decisions by the Federal supreme court:

Fallbrook Irrigation Dist. vs. Bradley, 164 U. S. 112, holds that the use of water for irrigation under a California statute is a public use; that the policy of the state of California was that irrigation of arid lands is a public purpose, and that the water thus used is put to a public use. The court pointed out that the constitution of California provided that the use of water is declared to be a public use. The court, following the declarations contained in the California constitution and statute, held the use was public although in fact the statute under consideration limited the use to the landowner.

Clark vs. Nash, 198 U. S. 361, construed a Utah statute which authorized an individual landowner to condemn a right of way across his neighbor's land for the enlargement of an irrigation ditch in order to irrigate his land. The state statute declared the
206 same to be a public use. The court adopted the statutory declaration of public use.

In Strickley vs. Highland Boy Mining Co., 200 U. S. 525, the court sustained a condemnation proceeding whereby a right of way was condemned across a placer mining claim, for the aerial bucket line of a mining corporation. Here, also, the statute provided that such use was a public use.

In Offield vs. New York N. H. & H. R. Co., 203 U. S. 378 the court considered a state statute which authorized the condemnation of a minority stockholders' interest in railway companies. The contention was made that the stock was not sought to be obtained for a public use, and it was decided that the purpose was a public one.

In Hairston vs. Danville & W. R. Co., 208 U. S. 606, a railroad company condemned land for a new track. This was held not to be a private use. The opinion illustrates the attitude of the supreme court of the United States:

"We assume that, if the condemnation was for private uses, it is forbidden by the 14th amendment." "The propriety of keeping in view by this court while enforcing the 14th amendment the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justified, and acted upon in Fallbrook Irrig. District vs. Bradley; Clark v. Nash; and Strickley v. Highland Boy Gold Min. Co. ubi supra. What was said in these cases need not be repeated here. No case is recalled where this court has condemned, as a violation of the 14th amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws."

In Louisville & N. R. Co. vs. Central Stock Yards Co., 212 U. S. 150, was involved the right to compel a common carrier to interchange cars and share its terminal facilities with a rival carrier. It was held this could not be done, and that the same would be a taking of property without due process of law. In the dissenting opinion by Judge McKenna it was said:

207 "And this court, yielding also to that purpose, has recently declared that a state might, in order to meet new conditions, elevate into a public use of property that which, under other conditions, had universally been held to be a private use."

From the foregoing review of the Federal supreme court decisions the relators submit that in every instance where the question has been raised the court has, in sustaining the right to condemn, pointed out that the state statute, or the court in construing the statute, had declared the purpose for which condemnation was sought, to be a public use. The statute under consideration, on the contrary, does not declare a public use, but a private use.

This brief is written in the hope that the court will order a rehearing of the cause en banc. That a full consideration of the point be indulged. In the opinion of the writer of this brief it is exceedingly dangerous to sustain a statute whereby private property may be taken for the private use of another at the latter's convenience or necessity. To sustain such legislation is to radically shift a constitutional landmark.

Respectfully submitted,

A. M. ABEL,
Attorney for Grays Harbor Logging Company.
W. H. ABEL,
Attorney for W. E. Boeing.

In the Supreme Court of the State of Washington, Monday, March 1, 1915.

208 No. 12450.

STATE ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF CHEHALIS COUNTY and COATS-FORDNEY LOGGING COMPANY, Respondents.

Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Chehalis County and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now on this 1st day of March, A. D. 1915, on motion of Bridges & Bruener of counsel for respondents, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs; the petition for rehearing denied, and that the said Coats-Fordney Logging Co. have and recover of and from the said Grays Harbor Logging Co. and W. E. Boeing the costs of this action taxed and allowed at Forty-six & 00/100 Dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance herewith.

Filed in Supreme Court of Washington Apr. 8, 1915. C. S. Reinhart, Clerk.

209 12450.

In the Supreme Court of the State of Washington.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY and MASON Irwin, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

Petition for Writ of Error.

Comes now the Grays Harbor Logging Company and W. E. Boeing and the State of Washington ex rel. Grays Harbor Logging Company and W. E. Boeing, relators herein, and respectfully petition and allege:

I.

That on October 16th, 1914, the Superior Court of Washington for Chehalis County, rendered its certain order and decree of con-

demnation against these relators in said action which was then pending in said court and was then entitled Coats-Fordney Logging Company, a corporation, petitioner, vs. Grays Harbor Logging Company, a corporation, W. E. Boeing, and Hayes & Hayes, Bankers, a corporation, respondents, and by said order and decree adjudged that the said Coats-Fordney Logging Company was entitled to condemn and appropriate a certain right-of-way over and across lands then and still owned by the said Grays Harbor Logging Company and W. E. Boeing, described as the Northwest quarter of
210 section thirty two, township nineteen north of range eight west of Willamette Meridian in Chehalis County, Washington, for the purpose of constructing and maintaining thereon a certain private logging railroad as more particularly appears by reference to the record and proceedings in said cause; that thereafter, and on March 1st, 1915, the Supreme Court of the State of Washington in said cause, then entitled State of Washington ex rel. Grays Harbor Logging Company and W. E. Boeing, Relators, vs. Superior Court of Chehalis County and Coats-Fordney Logging Company, Respondents, rendered its final judgment against the said Grays Harbor Logging Company and W. E. Boeing, affirming said judgment, decree, and order of condemnation of the said Superior Court of Washington for Chehalis County, and for costs in the sum of $26 and awarded execution thereon, as will appear by reference to the record and proceedings in said cause; and that said Supreme Court of Washington is the highest court of said state in which a decision in said suit could be had.

II.

That your petitioners, Grays Harbor Logging Company and W. E. Boeing, claim the right to remove said judgment, decree, and order of condemnation and said judgment of affirmance to the Supreme Court of the United States by writ of error under section 709 of the Revised Statutes of the United States, because said judgment, decree, and order of condemnation authorizes, permits, requires and constitutes a taking of the private property of the said Grays Harbor Logging Company and said W. E. Boeing for the private use of the said Coats-Fordney Logging Company, and without ne-
211 cessity therefor, in violation of the 14th amendment to the Constitution of the United States, as appears by the record and proceedings in said cause which is herewith submitted.

Wherefore petitioners pray the allowance of a writ of error returnable into the Supreme Court of the United States and for citation and supersedeas; and your petitioners will ever pray.

W. H. ABEL,
A. M. ABEL,
Attorneys for Petitioners.

It is now ordered that the writ of error issue as prayed and that supersedeas be granted and a stay of proceedings is hereby ordered

upon the furnishing and filing in this court of a bond in the penal sum of $2,000.00. Dated April 8, 1915.

GEO. E. MORRIS,
Chief Justice of the Supreme Court of the State of Washington.

212 & 213 In the Supreme Court of the State of Washington.

12450.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY and Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company, Respondents.

Assignment of Errors.

Comes now the Grays Harbor Logging Company and W. E. Boeing and the State of Washington ex Rel. Grays Harbor Logging Company and W. E. Boeing, relators herein, and file the following assignment of errors, upon which they will rely in prosecuting this cause by writ of error in and unto the Supreme Court of the United States.

First. That the order and decree rendered in the Superior Court of Washington for Chehalis County, and the judgment in affirmance thereof, rendered by the Supreme Court of the State of Washington, authorizes, permits, requires and constitutes a taking of the private property of the said Grays Harbor Logging Company and W. E. Boeing for the private use of respondent, Coats-Fordney Logging Company, and without necessity therefor in violation of the 14th amendment to the Constitution of the United States, and without due process of law.

GRAYS HARBOR LOGGING COMPANY AND W. E. BOEING, *Relators.*
W. H. ABEL,
A. M. ABEL,
Attorneys for Relators.

Filed in Supreme Court of Washington, Apr. 8, 1915. C. S. Reinhart, Clerk.

214 12450.

Citation to Defendants in Error.

Filed in Supreme Court of Washington, Apr. 22, 1915. C. S. Reinhart, Clerk. F. S. G.

UNITED STATES OF AMERICA, *ss:*

To the Superior Court of Washington for Chehalis County, Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty (60) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the supreme court of the state of Washington, wherein the State of Washington ex Rel. Grays Harbor Logging Company and W. E. Boeing and Grays Harbor Logging Company and W. E. Boeing are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

This 12 day of April, 1915.

[Seal of the Supreme Court, State of Washington.]

MORRIS,
Chief Justice.

Copy of the within citation received this — day of April, 1915, at Aberdeen, Washington.

—— ——,
Defendant in Error,
—— ——,
Defendant in Error,
By —— ——,
Attorneys for Defendants in Error.

215 [Endorsed:] 12450. Citation to Defendants in Error.

216 12450.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the

state of Washington, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Coats-Fordney Logging Company, a corporation, petitioner and respondent in error and Grays Harbor Logging Company, a corporation, and W. E. Boeing, respondents and plaintiffs in error, wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution of the United States, and the decision was in favor of such their validity; a manifest error hath happened, to the great damage of the said Grays Harbor Logging Company and W. E. Boeing, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the
217 same, to the supreme court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, within sixty (60) days from the date hereof, in the said supreme court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court of the United States, this ninth day of April, A. D. 1915, and of the year of our Independence the one hundred and thirty-ninth.

[Seal of the United States District Court, Western District of Washington.]

FRANK L. CROSBY,
Clerk of the United States District Court for the Western District of Washington,
By F. M. HARSHBERGER,
Deputy Clerk.

Allowed by—

MORRIS,
Chief Justice of the Supreme Court of Washington.

218 [Endorsed:] No. —. In the Supreme Court of the United States. Tacoma. State of Washington ex Rel. Grays Harbor Logging Co. and W. E. Boeing vs. Superior Court of Washington for Chehalis County and Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company. Writ of Error. Filed in Supreme Court of Washington, Apr. 12, 1915. C. S. Reinhart, Clerk.

219 In the Supreme Court of the State of Washington.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY, and Mason Irwin, Judge thereof, and Coats-Fordney Logging Company, Respondents.

Service of the attached writ of error, the bond filed in the Supreme Court of Washington therewith; the order to stay proceedings, and citation, hereby admitted this 17th day of April, 1915, by receipt of true copies of each thereof.

[Seal of the Superior Court Chehalis County, State of Washington.]

MASON IRWIN.
COATS-FORDNEY LOGGING COMPANY,
By BRIDGES & BRUENER, *Its Attorneys.*
SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY,
By W. C. BIRDWELL, *Clerk thereof.*

220 In the Supreme Court of the State of Washington.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY, and Mason Irwin, Judge thereof, and Coats-Fordney Logging Company, Respondents.

Affidavit of Service.

STATE OF WASHINGTON,
County of Chehalis, ss:

Bessie F. Daws, being first duly sworn, on oath deposes and says: That on April 17th, 1915, she personally served upon Bridges & Bruener, attorneys of record herein for Coats-Fordney Logging Company, and upon Mason Irwin, judge of the Superior Court of Washington for Chehalis County, and also upon W. C. Birdwell, clerk thereof, a true copy of the within and attached writ of error, citation, bond, and order staying proceedings, by personally delivering to and leaving with each of them, a true copy of each thereof, and that she has this day lodged with the clerk of the Supreme Court of the State of Washington, the original writ of error in this cause and a true copy thereof for the said Coats-Fordney Logging Company.

BESSIE F. DAWS.

Subscribed and sworn to before me this 21st day of April, 1915.

[Seal W. H. Abel, Notary Public, State of Washington. Commission expires Sep. 13, 1918.]

W. H. ABEL,
Notary Public for the State of Washington,
Residing at Montesano, Wn.

220½ In the Supreme Court of the State of Washington.

12450.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY, and Mason Irwin, Judge thereof, and Coats-Fordney Logging Company, Respondents.

Order to Stay Proceedings.

It appearing to the court that the relators above named have duly filed in this court their bond in the sum of two thousand dollars with good and sufficient securities, conditioned as required by law, that said bond has been approved,

Now, therefore, for good cause shown, the superior court of Washington for Chehalis county, Mason Irwin, judge thereof, and Coats-Fordney Logging Company, are hereby ordered to stay all further proceedings and desist from further action in this cause and court and in the superior court of Washington for Chehalis county upon the judgments rendered in each of said courts, pending the prosecution and determination of the writ of error sued out to review in the United States supreme court the proceedings in each of said state courts.

Dated in open court this 12 day of April, 1915.

MORRIS, *Chief Justice.*

Indorsed: Order to Stay Proceedings. Filed in Supreme Court of Washington, Apr. 12, 1915. C. S. Reinhart, Clerk.

221 In the Supreme Court of the State of Washington.

12450.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY, and Mason Irwin, Judge thereof, and Coats-Fordney Logging Company, Respondents.

Bond.

Know all men by these presents that we,

Grays Harbor Logging Company and W. E. Boeing, as principals, C. H. Shutt and C. E. Ale, each as sureties, are held and firmly bound unto the superior court of Washington for Chehalis county, and Mason Irwin, judge thereof, and Coats-Fordney Logging Company, respondents and defendants in error, in the sum of two thousand dollars, to be paid to the said obligees their representatives and assigns, for the payment of which well and truly to be made, we and each of us do hereby bind ourselves jointly and severally by these presents.

The condition of this obligation is such that whereas the above named State of Washington ex rel. Grays Harbor Logging Company and W. E. Boeing, plaintiffs in error, have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the supreme court of the state of Washington, and the superior court of Washington, for Chehalis County, and desire to secure a stay of proceedings, and of process, upon said judgments, and each thereof.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect, and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

222 GRAYS HARBOR LOGGING COMPANY,
Plaintiff in Error,

By A. M. ABEL, *Its Attorney.*
W. E. BOEING, *Plaintiff in Error,*
By W. H. ABEL, *His Attorney.*

C. H. SHUTT, *Surety.*
C. E. ALE, *Surety.*

STATE OF WASHINGTON,
County of Chehalis, ss:

C. H. Shutt and C. E. Ale, being each first duly sworn on oath deposes and says, each for himself: That he is one of the sureties named in and who executed the foregoing bond; that he is worth double the sum mentioned in said bond as the penalty thereof in personal and

non-exempt property within the state of Washington, over and above all his just debts and liabilities and exclusive of property exempt from execution.

C. H. SHUTT.
C. E. ALE.

Subscribed and sworn to before me this 9th day of April, 1915.

[SEAL.] W. H. ABEL,
Notary Public for the State of Washington,
Residing at Montesano.

The foregoing bond hereby approved this 12 day of April, 1915.
MORRIS, *Chief Justice.*

Indorsed: Bond. Filed in Supreme Court, of Washington, Apr. 12, 1915. C. S. Reinhart, Clerk.

223 No. 12450.

STATE OF WASHINGTON ex Rel. GRAYS HARBOR LOGGING COMPANY et al., Relators,
vs.
SUPERIOR COURT FOR CHEHALIS COUNTY et al., Respondents.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above entitled cause, and that in pursuance of the Writ of Error heretofore filed in this cause, I now transmit the same, together with the original Writ of Error and the original Citation to the Supreme Court of the United States.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Supreme Court at Olympia, this 28th day of April, 1915.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Endorsed on cover: File No. 24,737. Washington Supreme Court. Term No. 471. The State of Washington ex rel. Grays Harbor Logging Company and W. E. Boeing, plaintiffs in error, vs. The Superior Court of Washington for Chehalis County, Mason Irwin, Judge thereof, and Coats-Fordney Logging Company. Filed May 18th, 1915. File No. 24,737.

SUPREME COURT, U. S.
FILED
SEP 25 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. [redacted] 132

GRAYS HARBOR LOGGING COMPANY, *a corporation*, and W. E. BOEING,
Plaintiffs in Error,

vs.

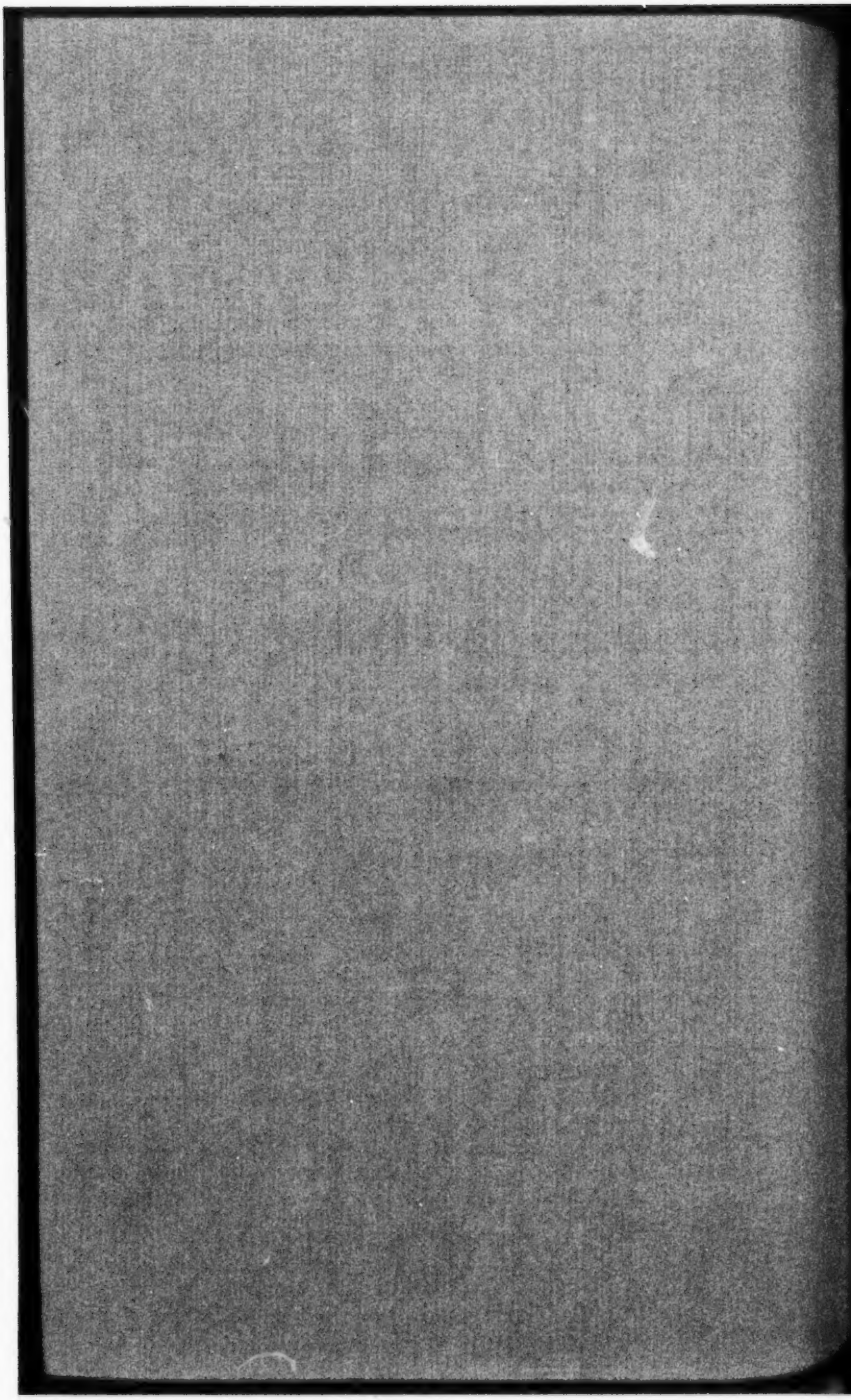
COATS-FORDNEY LOGGING COMPANY, *a corporation*, *Defendant in Error*,

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IN ERROR TO THE SUPREME COURT OF WASHINGTON.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM JUDGMENT OR TO TRANSFER TO THE SUMMARY DOCKET.

ALEX BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys for Defendant in Error.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 471

GRAYS HARBOR LOGGING COMPANY, *a corporation*, and W. E. BOEING,
Plaintiffs in Error,
vs.
COATS-FORDNEY LOGGING COMPANY, *a corporation, Defendant in Error,*

IN ERROR TO THE SUPREME COURT OF WASHINGTON.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM JUDGMENT OR TO TRANSFER TO THE SUMMARY DOCKET.

ALEX BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys for Defendant in Error.

Copy of the foregoing Motion and Notice, together with Statement of Facts, points and authorities, argument and appendix, received this ..... day of September, 1915.

.....

.....

Attorneys for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 471

GRAYS HARBOR LOGGING COMPANY, *a corporation*, and W. E. BOEING,
Plaintiffs in Error,

vs.

COATS-FORDNEY LOGGING COMPANY, *a corporation, Defendant in Error*,

MOTION.

Comes now the defendant in error, COATS-FORDNEY LOGGING COMPANY, a corporation, by its attorneys of record herein, and moves this Honorable Court:

First. To dismiss the writ of error herein, on the ground that there is no final judgment herein upon which to base such writ of error.

Second. To dismiss the writ of error herein on the ground that there is no Federal question involved; or if a Federal question be involved it is frivolous and without merit.

Third. To affirm the judgment of the Supreme Court of the State of Washington, on the ground that it is manifest that the writ of error was taken for delay only, and that the questions upon which the decision in this cause depends are so frivolous as to need little or no argument, having been repeatedly decided by this Court, contrary to the contentions of the plaintiffs in error.

Fourth. If this Court should decline to dismiss or affirm, to transfer this cause for hearing, to the summary docket, for the reason that the case is of such a character as not to justify extended argument.

ALEX BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys for Defendant in Error.

NOTICE OF MOTION.

The plaintiffs in error are hereby notified that the defendant in error will on Monday, the 18th day of October, 1915, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of the said court, the foregoing motions and each of them, and the brief in support thereof hereto attached, including portions of the record attached to the brief as an

appendix, all of which are now served upon you herewith.

ALEX BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys for Defendant in Error.

STATEMENT OF THE CASE.

Section 16, of the Constitution of the State of Washington, reads:

> "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into Court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor, be first made in money, or ascertained and paid into Court for the owner, irrespective of any benefits from any improvements proposed by such corporation, which compensation shall be ascertained by jury, unless a jury be waived, as in other civil cases in Courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property, for a use alleged to be public, the question whether the contemplated use be really public, shall be a judicial question, and shall be determined as such, without regard to any legislative assertion that the use is public."

Based upon the foregoing Section of the Constitution, the 1913 Legislature of the State of

Washington, passed an Act expressly designed for the procurement of private ways of necessity.

See Session Laws 1913, Page 412, Sections 1, 2 and 3.

See also Remington & Ballinger's Annotated Codes and Statutes of Washington, Sections 5857-1, 5857-2, and 5857-3.

Section 1 of that Act reads as follows:

> "An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of others, that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity, or to construct and maintain any drains, flumes, or ditches, on, across, over or through, the land of such other, for agricultural, domestic or sanitary purposes may condemn and take lands of such other sufficient in area for the construction and maintenance of such drain, flume or ditch, as the case may be. The term 'private way of necessity' as used in this Act, shall mean and include a right of way on, across, over or through the land of another for means of ingress or egress, and the construction and maintenance thereon of roads, logging railroads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried."

Section 2 of the law provides that the procedure for the condemnation of lands for private way of necessity as above provided, shall be as provided for condemnation of private property by

railroad companies. And Section 3 of the Act provides, that the condemning party shall contract and agree to carry on its railroad, any of the timber or other products of the lands through which such right is acquired.

The defendant in error, as petitioner, instituted suit in the Superior Court of the State of Washington, for Chehalis County, against the plaintiffs in error, as respondents, wherein it is alleged, in substance ,that it is a private corporation organized and existing under the laws of the State of Washington, and that its chief business is that of bringing saw logs and other timber products to market by means of its logging railroad, which railroad is several miles in length and fully equipped; that the northerly terminus of such railroad is at or near the southerly boundary line of a certain quarter section of land owned by the plaintiffs in error, and that defendant in error owns a large quantity of valuable standing timber which is to the north of the lands owned by the plaintiffs in error, and that in order to bring such timber to market it is necessary that such logging railroad be constructed over a part of the lands owned by plaintiffs in error, being a quarter section of land, and that it is necessary that defendant in error have and maintain a private way of necessity over such lands of plaintiffs in error, in order to bring to market the above mentioned standing timber belonging to the defendant in error; that

there is no other available or reasonably practical route or means of bringing such timber to market, except by constructing and maintaining the said logging railroad over and across the right of way sought to be acquired in the action; that the defendant in error is unable to reach any amicable agreement with the plaintiffs in error, concerning the acquisition of such right of way. A particular description of the right of way is set out in the petition.

Each of the plaintiffs in error demurred to the petition of the defendant in error on various grounds, and among others, that the laws of the State of Washington under which such action was instituted, were in violation of and contrary to the Constitutions of the State of Washington and of the United States.

Each of these demurrers was by the court overruled, and each of the plaintiffs in error answered, setting up, among other things, that by such action the defendant in error sought to take the property of plaintiffs in error, without due process of law and in violation of the Constitution of the United States and the State of Washington, and that the attempted taking was for a private use of defendant in error and not for a public use.

After the hearing of testimony on the question of necessity for such right of way, the court made and entered an order of condemnation,

wherein it was found and determined that the various allegations of the petition were true and correct and that the defendant in error, petitioner as aforesaid, had for years been extensively engaged in the removal of timber and bringing the same to market, and was still so engaged, and that the petitioner had constructed and equipped and had in full operation, a logging railroad several miles in length, the northerly terminus of which was at that time nearly to the lands owned by plaintiffs in error, through which the right of way was sought; that it was necessary for the proper use and enjoyment of the lands and timber of the defendant in error, to have and maintain a private right of way of necessity over and across the lands so owned by the plaintiffs in error, for the purpose of constructing and maintaining thereon its railroad, in order to bring to market the large amount and valuable timber located on lands owned by the defendant in error, to the north of the lands through which the right of way was sought, and that the petitioner had no other available or reasonably practical route over or through which to reach its said timber with its said logging railroad, and that in order to remove the said timber it was necessary that the petitioner obtain such right of way, and that the petitioner, defendant in error, was entitled to condemn and appropriate such right of way for the removal of its timber as aforesaid. Such order further set the

cause down for trial before a jury, for the purpose of determining the amount of recovery of the plaintiffs in error, or damages to be paid to them for taking of the said right-of-way.

Before the cause could be brought on for trial before a jury, for the purpose of determining the compensation to be made, the plaintiffs in error sued out a writ of *certiorari* and thereupon the cause was reviewed by the Supreme Court of the State of Washington, which court affirmed the decision of the lower court and expressly held that the proceedings were maintained by virtue of the hereinbefore mentioned private way of necessity law, and that such law and such proceedings thereunder were not in violation of any provision of the State or Federal Constitution, and said cause was remanded back to the lower court for trial before a jury upon the question of compensation.

Based upon the decision of the Supreme Court of the State of Washington, the writ of error herein was sued out.

So much of the various proceedings as are deemed necessary to a proper consideration of the motion of defendant in error, are attached hereto as an appendix.

The only question involved here is, whether the private way of necessity law of the State of Washington is in violation of the 14th Amendment of the Constitution of the United States.

ARGUMENT AND AUTHORITIES.

1.

The decision of the Supreme Court of the State of Washington is not such a final judgment as that the writ of error herein may be based thereupon.

It is unnecessary to cite the decisions of this court to the effect that the decision or judgment upon which a writ of error may be based must be a final one—must be one where all of the questions involved in the suit have been disposed of—where there is nothing further to do but to enforce the judgment of the court.

The decision of the State Supreme Court was not a final one because it was necessary that the cause should go back to the Superior Court and there be tried before a jury upon the question of compensation to be made. The order or judgment upon which the writ of *certiorari* to the State Supreme Court was based, was nothing more than a finding that the defendant in error was entitled to condemn the right of way which it sought; it merely determined that it was necessary for the defendant in error to acquire such right of way, and it was this order or judgment of the Superior Court which the State Supreme Court affirmed. After that it was necessary that the cause be remanded to the Superior Court for a trial before a jury, upon the question of compensation to be

made to the plaintiffs in error, and upon the verdict of the jury the Superior Court would make and enter its final decree appropriating the right of way to the use of the defendant in error. It is manifest, therefore, that all of the questions involved in the suit have not been disposed of. When the judgment fixing the compensation and decree of appropriation are made, it may be that the land owners will be perfectly satisfied and will not desire to proceed further with the litigation.

In eminent domain cases in the State of Washington, it is the practice under the statutes and decisions of the courts of that state, that after the petition in condemnation has been filed and served, testimony is taken before the court without a jury, on the question as to whether there is any necessity for the petitioner to acquire the property or right of way sought. At such hearing there is no testimony as to the amount or character of damage. If the Superior Court finds that there is no necessity, as above indicated, it enters a judgment dismissing the action. If the court determine that the petitioner is entitled to acquire such property or right of way, then the court enters what is ordinarily called an order of condemnation or necessity, wherein the court finds and adjudges that it is necessary that the petitioner acquire the property or right of way sought, and sets the cause for trial before a jury,

for the purpose of determining the amount of compensation to be paid.

Thereafter the cause comes on for trial solely upon the question of compensation and a judgment is entered upon the jury's verdict, and when the amount of the verdict is paid into court, a decree of appropriation is made, appropriating the property or right of way sought.

All that has been done in this action is, that the lower court has made its order of necessity.

The plaintiffs in error will doubtless contend that this court must consider the judgment of the State Supreme Court as final for the purposes of the questions involved here, because of the somewhat unusual statutes of the State of Washington and decisions of the Supreme Court of that state based upon such statutes.

It has been decided by the State Supreme Court, that the order or judgment of necessity is not a final judgment from which an appeal may be taken to the State Supreme Court, and that the only way whereby such judgment of necessity can be reviewed by the State Supreme Court, is by writ of certiorari, as was done in this case. Such decisions further hold that the final decree of appropriation based upon the jury's verdict of compensation, is a final judgment upon which an appeal to the State Supreme Court may be taken, but that under such appeal the last named court

does not have authority or power to review the judgment of necessity and can review only "the propriety and justness of the amount of damages in respect to the parties to the appeal."

Western American Co. v. St. Ann Co., 22 Wash. 158.

Seattle etc. R. R. Co. v. Bellingham etc. R. R. Co., 29 Wash. 491.

In other words, the State Supreme Court has decided that under the appeal provision of the eminent domain statute of the State of Washington, there can be an appeal only from the final decree of appropriation, and that "such appeal shall bring before the Supreme Court the propriety and justness of the amount of damages in respect to the parties to the appeal," and that the only way whereby the State Supreme Court can review the order of necessity and proceedings preliminary thereto, is by means of a writ of certiorari.

It does not follow, however, from these state decisions, that the question involved here, to-wit, the constitutionality of the state statute, could not be raised by appeal to the State Supreme Court. On the contrary, it is manifest that this constitutional provision can be raised not only in the certiorari proceedings, but in the appeal.

We therefore contend that this court has not jurisdiction, and that the writ of error herein is not based upon any final judgment.

See also the following cases:

Luxton v. North River Bridge Co., 147 U. S. 337.

So. Ry. Co. v. Postal Telegraph Co., 179 U. S. 641.

Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287.

In the case of *Luxton v. North River Bridge Co., supra*, the action was one for the appropriation of certain lands in New Jersey by condemnation thereof. Under the practice in New Jersey, after the petition for condemnation has been filed a justice of the supreme court of the state appoints three disinterested freeholders to examine and appraise the land and assess the damages; they shall make and file their return with the court, and either party aggrieved by the decision of the commissioners may appeal. The appointment of the commissioners may be reviewed by the state supreme court on writ of certiorari, and matters affecting the validity or regularity of the appointment of the commissioners may be considered. In this case the commissioners had been appointed and the land owner sued out a writ of error to the state court, and the question was, whether or not there was such a final judgment as that a writ of error would lie. This court dismissed the writ, saying that it does not lie "until after final judgment, disposing of the whole case,

and adjudicating all the rights, whether of title or of damages, involved in the litigation."

The case of *Southern Ry. Co. v. Telegraph Co., supra,* is almost identical with the case last above cited.

The case of *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., supra,* was one under the eminent domain laws of West Virginia. In that case commissioners to assess the damages were appointed and this court entertained a writ of error, but did so solely on the ground that the state court had previously held that the order appointing commissioners was a final judgment.

2.

The remainder of the motion will be argued under this subdivision.

The only contention by plaintiffs in error is, that the legislative act above mentioned authorizes the taking of private property for a private use, and is, therefore, in violation of the 14th Amendment of the Federal Constitution.

This court has so often upheld statutes of this character, that there can no longer be any merit in the contention of plaintiffs in error, and it is manifest that such question is so frivolous as to need little or no argument, and that this court should either dismiss the writ for lack of merit or should affirm the judgment of the State Supreme Court.

The constitutionality of this statute was first raised in the case of *State of Washington ex rel Mountain Timber Co. v. Superior Court*, 77 Wash. 585. That case was to all intents and purposes identical with this case. In that case the court said:

> "The relator seeks to condemn a right of way for a logging road over and across land owned by the respondents Wiberg, in order that it may convey its timber from lands owned by it to its saw mill. The petition discloses that there is no outlet for a part of its timber other than over the respondents' lands, and that it cannot secure the right of way except by condemnation."

The court then proceeds to quote the same constitutional and statutory provisions which we have quoted in the beginning of this brief, and after a somewhat elaborate discussion as to the constitutionality of the statute the court further said:

> "We think the Legislature acted within its constitutional powers in defining a private way of necessity and establishing the proceedure for making the right available. As defined, it is promotive of the public welfare, in that it prevents a private individual from bottling up a portion of the resources of the state. * * * The taking of private property for private use for the promotion of the general welfare, upon due notice and hearing and the payment of compensation, is not incompatible with due process of law, as guaranteed by the Federal Constitution."

The Constitution of the State of Washington provides that,

> "The question whether the contemplated use be really public, shall be a judicial question, and shall be determined as such, without regard to any legislative assertion that the use is public."

See Section 16 hereinbefore quoted.

In the Mountain Timber Co. case the State Supreme Court has expressly determined that a private way of necessity is a taking for a public purpose and not for a private purpose.

The construction given by the highest state court of a state statute, is binding upon and will be followed by the Federal Supreme Court.

Baltimore Traction Co. v. Baltimore Belt R. R. Co., 151 U. S. 137.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685.

Backus v. Fort Street Union Depot Co., 169 U. S. 557.

The first case cited was a proceeding in condemnation. It was contended that the state statute was in violation of the 14th Amendment of the Federal Constitution, for the reason that the statute did not require notice to be given. In ruling on the motion to dismiss the writ of error this court said:

> "We are bound to accept the conclusion of the state court as to the proper construction of the statute of the state."

We deem it unnecessary to cite any more of the numerous decisions out of this court, in support of the proposition that the construction of a statute given by the highest state court will be followed by this court.

Inasmuch as the State Supreme Court has expressly held that the statute involved in this case "is promotive of public welfare, in that it prevents a private individual from bottling up a portion of the resources of the state," it would seem to follow necessarily that this court would hold, as a matter of course, that the statute in question authorizes a taking for a public use and is, therefore, not in violation of any provision of the Federal Constitution.

Even if this court should casually look into the merits of the case, we believe it will at once appear that the questions involved here have been so often decided adversely to the contention of plaintiffs in error, in cases quite like the case at bar, that the judgment of the State Supreme Court will be affirmed.

A few of such cases are the following:

Clark v. Nash, 198 U. S., 361. In this case the statute of Utah authorized condemnation by a private land owner, of right of way across his

neighbor's land for an irrigation ditch, in order to enable the condemning party to obtain water to irrigate his own land. The contention was that the land was sought for a private and not a public use and the statute was therefore unconstitutional. This court, in upholding the statute, said:

> "But whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. * * * This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a state, as also its courts, must, in the nature of things, be more familiar with such facts and with the necessity and occasion for the irrigation of the lands, than can anyone be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their due weight with the state courts."

In the case of *Hairston v. Danville etc. Ry. Co.*, 208 U. S., 598, the question involved was the constitutionality of a state statute of Virginia concerning eminent domain. The state courts held that the use contemplated, while in some regards a private use, was in reality a public use, and this court, in upholding the statute, said:

"No case is recalled where this court has condemned, as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public use in conformity with its laws. * * * We have found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use, of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aerial bucket line; or of the right to flow the land of another by the erection of a dam. It remains for the future to disclose what cases, if any, of taking for uses which the state constitution, law, and court approve will be held to be forbidden by the 14th Amendment to the Constitution of the United States."

The case of *Strickley v. Highland Boy Gold Mining Co.*, 200 U. S. 527, was a proceeding begun by the defendant in error, a private mining corporation, "to condemn a right of way for an aerial bucket line across a placer mining claim of the plaintiffs." The suit was maintained under a statute of Utah authorizing such condemnation. The state supreme court upheld the constitutionality of the statute which gave a right of eminent domain "for roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores or the working of mines." In upholding the state statute this court said:

"In the opinion of the legislature and supreme court of Utah, the public welfare of that state de-

> mands that aerial lines between the mines upon its mountain sides and the railways in the valleys below, should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong."

In the case of *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403, it was held that the construction given to a state statute by the highest court of the state, must be accepted by this court in judging whether the statute is in violation of the Federal Constitution.

See also the following cases out of this court, to the same effect:

Head v. Amoskeag Mfg. Co., 113 U. S., 9.

Jackson v. Lamphire, 7 Law Ed. (U. S.), 679.

Fallbrook Irrigation Dist. v. Bradley, 164 U. S., 112.

The people of the State of Washington have in all possible ways and manners declared that a private way of necessity such as is sought in this case, is really a public use and for the public welfare. The State Constitution expressly authorizes the exercise of the right of eminent domain for a private way of necessity. The Legislature has made operative this provision of the Constitution by passing the act involved here, and the Supreme Court of the State has upheld

the act as not in violation of either the State or Federal Constitution, and has expressly declared that the private way of necessity statute provides for a use which is for the public welfare.

There are a large number of State Supreme Court decisions upholding statutes similar to the one in question, some of which are cited below.

Ortiz v. Hansen, 83 Pac. (Col.) 964. This case upholds the constitutionality of a statute of Colorado, authorizing the owner of land to condemn for an irrigating ditch across the lands of another for the purpose of furnishing water to the condemnor's land.

Los Angeles County v. Reyes, 32 Pac. (Cal.) 233. In this case the California Supreme Court upheld a statute providing that private roads might be opened for the convenience of one or more residents.

In Re Irrigation District, 92 Cal., 309.

The Georgia constitution provides that in cases of necessity private ways may be granted upon just compensation, and statutes passed putting such constitutional provision in effect have been upheld by the highest courts of Georgia in the case of *Jones v. Penable*, 120 Ga., 1.

Latah County v. Peterson, 16 L. R. A. (Idaho) 81.

The constitution of Colorado provides that,

> "Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs," etc.

The legislature passed an act putting this constitutional provision in effect and the act was upheld by the supreme court of that state in the case of *Bell v. Lamborn*, 20 L. R. A. 241.

See also the following cases:

Consolidated Milling & Trading Co. v. Gold Mining Co., 150 Pac. 313.

In Re Private Road, 112 Pa. 183.

Colbille v. Judy, 73 Mo. 651.

Lewis on Eminent Domain, Vol. 1, 2nd Ed., Sec. 206-A.

If the court should not see fit to either dismiss the writ or affirm the judgment, on our motion, then we ask that the cause be transferred to the summary docket, for the reason that any considerable delay in the final decision of this case will be very detrimental to the interest of the defendant in error.

ALEX BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,

Attorneys for Defendant in Error.

Washington, D. C.

APPENDIX.

The following are such parts of the record as are deemed necessary to the proper consideration of the motions of defendant in error.

PETITION.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR CHEHALIS COUNTY.

COATS-FORDNEY LOGGING COMPANY, *a corporation, Petitioner,*

vs.

GRAYS HARBOR LOGGING COMPANY, *a corporation,* HAYES & HAYES, BANKERS, *a corporation, and* W. E. BOEING, *Respondents.*

To the Judge of said Court:

Your petitioner Coats-Fordney Logging Company, a corporation, alleges and respectfully shows to the court:

1.

That the Coats-Fordney Logging Company is a corporation duly organized and existing under and by virtue of the laws of the state of Washington, having its principal place of business in the city of Aberdeen in said state; that it has duly paid all license fees due from it to the state of Washington and that its entire capital stock has been subscribed; that it has power by the terms of its articles of incorporation, among other things, to do a general logging business, to acquire, own and hold all manner and kind of real estate and timber

lands and interests therein, and to construct, maintain and operate a logging railroad or railroads with the necessary spurs etc., for the purpose of conveying its timber products to market.

2.

That your petitioner for a number of years past, has been engaged in the extensive logging of timber in Chehalis county, Washington, and is now engaged in the logging of timber lands owned or controlled by it, or in which it has an interest, and that your petitioner has for a number of years past, maintained and operated as a part of its equipment, and as a means of conveying its timber products to market, a private logging railroad, and is now operating and maintaining such private logging railroad for the purpose aforesaid; that said logging railroad extends from the banks of the Wishkah river, in Chehalis county, Washington, in a northerly direction, the northerly terminus of its main line being at the present time, in, at or about Section 31, in Township 19 North, Range 8 West of the Willamette Meridian, in said county and state.

3.

That the respondents above named are all the owners, incumbrancers or persons having any interest in the real estate hereinafter described, as shown by the public records of the county of Chehalis and state of Washington.

4.

That your petitioner is the owner in fee of the southwest quarter (SW¼) of section thirty-two (32),

sections thirty (30) and twenty (20), the southwest quarter (SW¼) of section ten (10), the southwest quarter (SW¼) of section three (3), all in township nineteen (19) north of range eight (8), west of the Willamette Meridian, in Chehalis county, Washington, all of which timber lies in a westerly and northerly direction from the lands owned by the respondents, except the southwest quarter (SW¼) of section thirty-two (32). That your petitioner desires to extend its logging railroad from its present northerly terminus in section thirty-one (31), township nineteen (19), north, range eight (8) west of the Willamette Meridian, in a northerly and easterly direction and through the northwest quarter (NW¼) of section thirty-two (32), township and range aforesaid, owned by the said respondents, for the purpose of reaching its timber lands hereinabove described, and for the purpose of conveying said timber to market. That it is necessary for the proper use and enjoyment of the lands owned by your petitioner, hereinabove described, to have and maintain a private way of necessity, over and across the said northwest quarter (NW¼) of section thirty-two (32), owned by the respondents, said private way of necessity to consist of a right of way on, across, over and through the said northwest quarter (NW¼) of section thirty-two (32), owned by the said respondents, for the purpose of constructing and maintaining thereon a private logging railroad for the purpose of taking over said right of way, and by means of said logging railroad, timber products to be taken from the lands of the said petitioner hereinabove described. That your petitioner has no other available or reasonably practical route over

or through which to reach its said timber lands with its said logging railroad, except the route contemplated through the said northwest quarter (NW¼) of section thirty-two (32), and your petitioner has not any means of ingress or egress to or from said lands except through said northwest quarter (NW¼).

5.

Your petitioner does hereby contract and agree to carry and convey over its said logging railroad, to either termini thereof, any of the timber or other produce of the lands through which such right is desired to be acquired by this proceeding at any and all times so long as said road is maintained and operated, such hauling or carrying to be done at reasonable prices.

6.

Your petitioner further states that it has attempted to come to an amicable agreement with the owners of said land, the above named respondents for said right of way, and the price to be paid therefor, but said owners have refused to grant to your petitioner said right of way or any right of way upon any terms whatsoever.

7.

That the following is a description of the lands, real estate, premised and property sought to be condemned and appropriated herein by your petitioner, to-wit:

A strip or piece of land containing three and five tenths (3.5) acres, more or less, being all that part of the northwest quarter (NW¼) of section

thirty-two (32), township nineteen (19), north, range eight (8) west of the Willamette Meridian, that lies within twenty-five (25) feet of each side of the center line of said proposed logging railroad, as the same has been surveyed over and across said property, said center line being more particularly described as follows:

Beginning at a point 179.5 north of quarter corner on the west side of section thirty-two (32); thence 528 minutes on a tangent whose bearing is N 38 degrees E to a point; thence 260 minutes N on a curve to the left whose radius is 713.8 to a point; thence 234 minutes on a tangent whose bearing is 17 degrees E to a point; thence 394 minutes on a curve to the right whose radius is 573 minutes to a point; thence 372 minutes on a tangent whose bearing is N 57 degrees E to a point; thence 521 minutes on a curve to the left whose radius is 713.8 to a point; thence on a tangent 727 minutes whose bearing is N 15 degrees E to a point on the section line between section twenty-nine (29) and section thirty-two (32), a distance of 1654 minutes east of the northwest corner section thirty-two (32) aforesaid.

Wherefore, your petitioner prays that a jury may be empaneled to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by your petitioner, to said owner or owners, incumbrancers and others interested, for the taking of said lands and premises above described, or in case a jury be waived in the manner prescribed by law, then that the compensation to be made as aforesaid, be ascertained and determined by the court or judge thereof; that upon the payment of the damages so assessed, into court, judgment be entered

appropriating the premises above described to the purposes of your petitioner, as above set forth.

COATS-FORDNEY LOGGING COMPANY, *Petitioner.*
By WALTER L. STOUT, *its Manager.*

BRIDGES & BRUENER, *Attorneys for Petitioner.*

State of Washington,
County of Chehalis. ss:

Walter Stout, being first duly sworn upon his oath deposes and says: That he is the manager of Coats-Fordney Logging Company, a corporation, and affiant makes this verification on its behalf, being thereunto duly authorized; that he has read the foregoing petition, knows the contents thereof and the same is true as he verily believes.

WALTER L. STOUT.

Subscribed and sworn to before me this 6th day of August, 1914.

(Seal of Notary). THEO. B. BRUENER,
Notary Public in and for the state of Washington, residing at Aberdeen.

"Filed in the office of County Clerk, Chehalis Co., Wash., Aug. 7, 1914. LEROY HERRIMAN, *Clerk.*
By W. S. BIRDWELL, *Deputy.*"

DEMURRER.

IN THE SUPERIOR COURT OF WASHINGTON, FOR CHEHALIS COUNTY.

COATS-FORDNEY LOGGING COMPANY, *a corporation, Petitioner,*

vs.

GRAYS HARBOR LOGGING COMPANY, *a corporation,* HAYES & HAYES, BANKERS, *a corporation,* and W. E. BOEING, *Respondents.*

The defendant, W. E. Boeing, now appears and demurs unto the petition in this cause.

1.

Because said petition fails to state facts sufficient to constitute a cause of action, or cause for condemnation of defendant's said lands.

2.

Because the petitioner is without legal capacity to maintain the action.

3.

Because this proceeding, and the statute under which this proceeding is waged, to-wit: Chapter 133 of the Session Laws of 1913 of the State of Washington are contrary to, and in violation of, the constitution of the state of Washington, and of the United States.

W. H. ABEL, *Attorney for Respondent,*

W. E. BOEING.

P. O. Address: Montesano, Wash.

Service accepted this 20th Aug., 1914.

BRIDGES & BRUENER,
Attorneys for Petitioner.

"Filed in the office of County Clerk, Chehalis County, Wash., Aug. 21, 1914.

LUROY HERRIMAN, *Clerk.*"

DEMURRER.

IN THE SUPERIOR COURT OF WASHINGTON, FOR CHEHALIS COUNTY.

COATS-FORDNEY LOGGING COMPANY, *a corporation, Petitioner,*

vs.

GRAYS HARBOR LOGGING COMPANY, *a corporation,* HAYES & HAYES, BANKERS, *a corporation,* and W. E. BOEING, *Defendants.*

The defendant, Grays Harbor Logging Company, now appears and demurs unto the petition in this cause:

1.

Because said petition fails to state facts sufficient to constitute a cause of action, or cause for condemnation of defendant's said lands.

2.

Because the petitioner is without legal capacity to maintain the action.

3.

Because this proceeding, and the statute under which this proceeding is waged, to-wit: Chapter 133 of the Session Laws of 1913 of the State of Washington are contrary to, and in violation of, the Constitution of the State of Washington, and of the United States.

A. M. ABEL,

Attorney for Respondent Grays Harbor Logging Company. P. O. Address: Finch Bldg., Aberdeen, Wash.

Service admitted this 20th Aug., 1914.

BRIDGES & BRUENER,
Attorneys for Petitioner.

"Filed in the office of County Clerk, Chehalis Co., Wash., Aug. 21, 1914.

LUROY HERRIMAN, *Clerk.*"

ORDER ON DEMURRER.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR CHEHALIS COUNTY.

COATS-FORDNEY LOGGING COMPANY, *Petitioner,*

vs.

GRAYS HARBOR LOGGING CO., W. E. BOEING *et al., Respondent.*

This cause coming on for hearing on the demurrer of defendant Grays Harbor Logging Company to the petition of petitioner and the same being argued by counsel and the court being fully advised in the premises, it is ordered that the said demurrer be and the same is hereby overruled and denied, to which ruling of the court the said respondent excepts and his exception is allowed.

Done in open court this 5th day of Sept., 1914.

BEN SHEEKS, *Judge.*

"Filed September 5, 1914, and entered on page 405 of Journal No. 32.

LUROY HERRIMAN, *Clerk.*
By W. C. BIRDWELL, *Deputy.*"

ORDER OF DEMURRER.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR CHEHALIS COUNTY.

COATS-FORDNEY, LOGGING COMPANY, *Petitioner,*

vs.

GRAYS HARBOR LOGGING CO., W. E. BOEING *et al., Respondents.*

This cause coming on for hearing on the demurrer of W. E. Boeing to the petition of petitioner and the same being argued by counsel, and the court being fully advised in the premises, it is ordered that the said demurrer be and the same is hereby overruled and denied, to which ruling of the court the said respondent excepts and his exception is allowed.

Done in open court this 5th day of Sept., 1914.

MASON IRWIN, *Judge.*

"Filed September 5, 1914, and entered on page 405 of Journal No. 32.

LUROY HERRIMAN, *Clerk.*
By W. C. BIRDWELL, *Deputy.*"

ANSWER.

IN THE SUPERIOR COURT OF WASHINGTON, FOR CHEHALIS COUNTY.

COATS-FORDNEY COMPANY, *a corporation, Petitioner,*

vs.

GRAYS HARBOR LOGGING COMPANY, *a corporation,* HAYES & HAYES, BANKERS, *a corporation,* and W. E. BOEING, *Defendants.*

The defendant, W. E. Boeing, makes answer to the petition herein as follows:

1.

He denies each and every allegation contained in the petition, except, however, it is admitted and alleged that this defendant at the time this proceeding was commenced, owned and he still owns, an undivided one-half interest in fee simple and in the lands described in said petition, and except also it is admitted and alleged that the petitioner, Coats-Fordney Logging Company, is a private corporation organized for private purposes under the laws of the state of Washington.

As a defense to said petition this defendant alleges:

1.

That by this proceeding the petitioner seeks to take the said property of this defendant without due process of law, and in violation of the constitution of the United States, and the constitution of the State of Washington. That said attempted taking of private property of this defendant is for the private use of the petitioner, and not for any public use, and no necessity exists therefor.

Wherefore this defendant prays the dismissal of said proceeding at petitioner's cost.

W. H. ABEL,
Attorney for W. E. Boeing, Defendant.

State of Washington,
County of Chehalis. ss:

W. H. Abel, being first duly sworn on oath, deposes and says: That he is the attorney for W. E. Boeing, one of the defendants herein, and makes this verification on his behalf, because said defendant is at this time absent from Chehalis County and from the State of Washington; that he has read the within answer, knows the contents thereof, and that the same is true as he verily believes.

W. H. ABEL.

Subscribed and sworn to before me this 10th day of September, 1914.

A. M. ABEL,
Notary Public for the State of Washington, residing at Aberdeen.

Service of the within Answer hereby admitted by receipt of true copy thereof this 11th day of Sept., 1914.

BRIDGES & BRUENER,
Attorneys for Petitioner.

"Filed in the office of County Clerk, Chehalis Co., Wash., Sept. 12, 1914.

LUROY HERRIMAN, *Clerk,*
By W. C. BIRDWELL, *Deputy.*"

ANSWER.

IN THE SUPERIOR COURT OF WASHINGTON, FOR CHEHALIS COUNTY.

COATS-FORDNEY LOGGING COMPANY, *a corporation, Petitioner,*

vs.

GRAYS HARBOR LOGGING COMPANY, *a corporation*, HAYES & HAYES, BANKERS, *a corporation*, and W. E. BOEING, *Defendants.*

The defendant, Grays Harbor Logging Company, makes answer to the petition herein as follows:

1.

It denies each and every allegation contained in the petition, except, however, it is admitted and alleged that this defendant at the time this proceeding was commenced, owned, and it still owns, an undivided one-half interest in fee simple in the lands described in said petition, and except also it is admitted and alleged that the petitioner, Coats-Fordney Logging Company, is a private corporation organized for private purposes under the laws of the State of Washington.

As a defense to said petition this defendant alleges:

1.

That it is a corporation duly organized under and by virtue of the laws of the state of Washington; that it has paid its license fees last due unto the State of Washington.

2.

That by this proceeding the petitioner seeks to take the said property of this defendant without due process of law, and in violation of the constitution of the United States, and the constitution of the State of Washington. That said attempted taking of the pri-

vate property of this defendant is for the private use of the petitioner, and not for any public use, and no necessity exists therefor.

Wherefore this defendant prays the dismissal of said proceedings at petitioner's cost.

A. M. ABEL,
Attorney for Grays Harbor Logging Company, Defendant.

State of Washington,
County of Chehalis, ss:

C. H. Shutt, being first duly sworn on oath, deposes and says: That he is the manager of the defendant, Grays Harbor Logging Company, and makes this verification in its behalf; that he has read the within answer, knows the contents thereof, and that the same is true as he verily believes.

C. H. SHUTT.

Subscribed and sworn to before me this 10th day of September, 1914.

A. M. ABEL,
Notary Public for the State of Washington, residing at Aberdeen.

Copy admitted this 11th Sept., 1914.

BRIDGES & BRUENER,
Attorneys for Petitioner.

"Filed in the office of the County Clerk, Chehalis Co., Wash., Sept. 12, 1914.

LUROY HERRIMAN, *Clerk*,
By W. C. BIRDWELL, *Deputy*."

ORDER OF CONDEMNATION.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR CHEHALIS COUNTY.

COATS-FORDNEY LOGGING COMPANY, *a corporation, Petitioner,*

vs.

GRAYS HARBOR LOGGING COMPANY, *a corporation,* W. E. BOEING, and HAYES & HAYES, BANKERS, *a corporation, Respondents.*

This matter having come on to be heard before the court, on the question of necessity and the preliminary order of condemnation, on the 24th day of September, 1914, Bridges & Bruener appearing for the petitioner, A. M. Abel appearing for the respondent Grays Harbor Logging Company, and W. H. Abel appearing for the respondent W. E. Boeing, and the respondent Hayes & Hayes, Bankers, making no appearance whatsoever, and the petitioner having introduced its testimony and the said respondents having introduced their testimony, and the matter having been argued to the court, and the court having taken the same under advisement, and later the court having rendered an opinion herein in favor of the petitioner and holding that the order of condemnation should be made herein as prayed for, and now the court being satisfied in the premises, doth find, decide, determine and adjudge as follows:

1.

That the petitioner Coats-Fordney Logging Company is a corporation duly organized and existing under

and by virtue of the laws of the State of Washington and having its principal place of business in Aberdeen in said state; that it has duly paid all license fees due from it to the state of Washington; that its entire capital stock has been subscribed, as provided by law; that under its articles of incorporation, it has power and authority, among other things, to do a general logging business and to acquire, own and hold all manner and kind of real estate and timber lands and interests therein, and to construct, maintain and operate logging railroads with the necessary spurs, switches sidings, etc., for the purpose of conveying its timber products to market.

II.

That the respondent Grays Harbor Logging Company, is a private corporation organized and existing under and by virtue of the laws of the state of Washington, and that said last named respondent, together with the respondent, W. E. Boeing, are the owners of the northwest quarter (NW¼) of Section 32, township 19, north range 8, west of the Willamette Meridian in Chehalis county, Washington, and are the only owners or persons interested in the said lands, as shown by the records of the said county, except the respondent, Hayes & Hayes, Bankers, whom the records show, or tend to show, at the time of the commencement of this action, had some lien upon or interest in the said lands by mortgage or otherwise. That said mortgage has been satisfied since the commencement of this action and Hayes & Hayes have now no interest therein.

III.

That the said petitioner is the owner of all of section 30 and all of section 20, and the southwest quarter (SW¼) of section 10, and the southwest quarter (SW¼) of section 8, all in township 19, north of range 8, west of the Willamette Meridian, in said Chehalis county, and which said lands so owned by petitioner, have upon them large quantities of valuable timber, all of which said lands and timber lie to the north of the northwest quarter (NW¼) of said section 32 so owned by the said respondents.

IV.

That the petitioner for a number of years last past, has been extensively engaged in the removal of timber in the said county, and still is so engaged, and that it has been and is so removing its said timber by means of a private logging railroad, thus bringing said timber to tidewater in the Wishkah river, thence said timber being brought to market down said river in tidewater; that in its said logging operations the petitioner has constructed, maintained and operated, and now has constructed and is maintaining and operating, a fully equipped logging railroad, the main line of said logging railroad extending from the easterly bank of the Wishkah river in tidewater, northerly to its northerly terminus on its said main line at a point in section 31, township 19, north of range 8, west, in said county, and the said railroad is and has been fully equipped for logging purposes; that the petitioner is desirous of removing the timber from its lands as above described, and in order to so do is desirous of extending its said

main line northerly through a part of the said NW¼ of said section 32 so owned by respondents.

V.

That it is necessary for the proper use and enjoyment of the petitioner's said lands and for the removal of the timber thereupon by petitioner, to have and maintain a private way of necessity over and across the said N.W¼ of said section 32, said private way of necessity to consist of a right-of-way over and across said last named quarter section of land, for the purpose of constructing and maintaining thereon a private logging railroad in order to take over said right-of-way of said railroad, the timber products of the lands so owned by the said petitioner; that the petitioner has no other available or reasonably practical route over or through which to reach the said timber lands with its said logging railroad, except the route sought to be acquired herein, a particular description of which is hereinafter set out; that in order to remove the said timber by means of its said logging railroad or otherwise, it is necessary that the said petitioner cross over and upon lands which it does not own and over which it has no control and through which it has no rights-of-way for logging purposes.

VI.

That due and regular service of notice and petition herein has been had upon the said respondents and all thereof, in the manner and way provided by law, and this court has jurisdiction of the subject matter of this action and each and all of the said respondents for the purposes of this action.

VII.

That in the petition herein and by means of testimony introduced at the hearing, the petitioner, has contracted and agreed to carry and convey over its said logging railroad, to either termini thereof, any of the timber or other products of the lands of the said respondents, through which said right-of-way is sought to be acquired, at any and all time, so long as said road is maintained and operated, such hauling or carrying to be done at reasonable prices.

VIII.

That prior to the commencement of this action the petitioner attempted to come to an amicable agreement with the said respondents, for the purchase by the petitioner of the right-of-way in this action sought by it, but the petitioner and the respondents have been unable to agree upon the terms and conditions of such proposed right-of-way.

IX.

The right-of-way hereinabove mentioned and sought to be acquired, is a strip of land 50 feet in width over and across a portion of the NW¼ of section 32, township 19, north range 8, west of the Willamette Meridian in Chehalis county, Washington, said strip containing 3.5 acres ,more or less, and which said strip of land is 25 feet on each side of and parallel with the following described center line through said NW¼ of section 32, to-wit:

Beginning at a point 179.5 north of quarter corner on the west side of section 32; thence 528 minutes on a

tangent whose bearing is N 38 degrees E to a point, thence 260 minutes on a curve to the left whose radius is 713.8 to a point; thence 234 minutes on a tangent whose bearing is N 17 degrees E to a point; thence 394 minutes on a curve to the right whose radius is 573 minutes to a point; thence 372 minutes on a tangent whose bearing is N 57 degrees E to a point; thence 521 minutes on a curve to the left whose radius is 713.8 to a point; thence on a tangent 727 minutes whose bearing is N 15 degrees E to a point on the section line between section 29 and section 32, a distance of 1654 minutes East of the northwest corner section 32 aforesaid.

X.

It is therefore ordered and adjudged that the said petitioner is entitled to condemn and appropriate the aforesaid right-of-way for the purpose of constructing thereupon its said private logging railroad, together with all proper or necessary spurs, switches, sidings or other improvements proper or necessary in the orderly construction, maintenance and operation of its said railroad, and to maintain, equip and operate such railroad only for the following purposes, to-wit: For the removal of any and all timber products located and being upon section 30, section 20, the SW¼ of section 10, and the SW¼ of section 8, all in township 19, north range 8, west of the Willamette Meridian, in Chehalis county, Washington.

And it is further ordered and adjudged that the said cause be set down for trial for the assessment of damages for the taking, damaging or injuriously affect-

ing the said property, and to ascertain, determine and assess the damages and compensation to be made in money by the said petitioner, irrespective of any benefits from any improvement proposed by the said petitioner, to the respondents, for the taking, damaging or injuriously affecting the said land, premises and property.

And it is further ordered that the said cause be and the same is here set down for trial before a jury, on the 26th day of October, 1914.

To all of which said order each of the respondents Boeing and Grays Harbor Logging Company excepts and exceptions are allowed.

Dated this 15th day of October, 1914.

MASON IRWIN, *Judge.*

"Filed October 16, 1914, and entered on page 498 of Journal No. 32. Luroy Herriman, Clerk, by W. C. Birdwell, Deputy Clerk."

* * * * * *

PETITION.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

12450.

Filed Oct. 22, 1914.
C. S. REINHART, *Clerk.*
F. S. G.

STATE OF WASHINGTON on relation of GRAYS HARBOR LOGGING COMPANY and W. E. BOEING,
Relators,

vs.

SUPERIOR COURT OF WASHINGTON, *for Chehalis County,* and MASON IRWIN, *Judge thereof,* and COATS-FORDNEY LOGGING COMPANY,
Respondents.

Comes now the relators, Grays Harbor Logging Company and W. E. Boeing, and respectfully petition the court and allege:

1.

That on the 7th day of August, 1914, the respondent, Coats-Fordney Logging Company, a corporation, filed in the Superior Court of Washington for Chehalis County its certain petition to condemn an alleged private way of necessity for logging railroad over, upon and across the northwest quarter of section 32, township 19 north range, 8 west, in Chehalis county, said lands being then and ever since owned in fee simple by the said relators, Grays Harbor Logging Company, and W. E. Boeing. That said petition alleged among other things that said Coats-Fordney Logging Company owned section 30, section 20, southwest quarter of section 8, and southwest quarter of section 10, all in township 19 north range 8 west, in Chehalis county; that said lands had thereon valuable timber which the said Coats- Fordney Logging Company proposed to log and remove over a railroad which it intended to build across the said northwest quarter of section 32, township 19 north range 8 west.

2.

That to said petition these relators filed a demurrer upon the following grounds:

1. Because said petition fails to state facts sufficient to constitute a cause of action, or cause for condemnation of these defendants' said lands.

2. Because the petitioner is without legal capacity to maintain the action.

3. Because this proceeding, and the statute under which this proceeding is waged, to-wit: Chapter 133 of the session laws of 1913 of the state of Washington, are contrary to, and in violation of, the constitution of the state of Washington, and of the United States.

3.

That the said superior court and Mason Irwin, judge thereof, after argument, erroneously overruled said demurrer, to which these relators duly excepted, and whereupon these relators severally filed answers to said petition, alleging in substance and legal effect that they, these relators, Grays Harbor Logging Company and W. E. Boeing, owned said northwest quarter of said section 32 in fee simple at the time said proceeding commenced, and ever since, and that by said proceeding, the petitioner therein, Coats-Fordney Logging Company, seeks to take the said property of the said Grays Harbor Logging Company and W. E. Boeing without due process of law, and in violation of the constitution of the United States, and the constitution of the state of Washington, and that said attempt of the taking of their said property was for the private use of the said Coats-Fordney Logging Company, and not for any public use, and no necessity existed therefor.

4.

That thereafter a trial was had upon said petition to condemn and said answers, at which these relators offered to prove by evidence that the present termini of said proposed logging railroad was in section 3, township 19, north range 8 west, and that the said Coats-Fordney Logging Company then had a right of way and easement across section 31 directly into said section 30, township 19, north range 8 west, owned by it, and that its said proposed logging railroad could be built across said section 31 directly into section 30 at less cost than through these relators' said lands, to-wit: the northwest quarter of said section 32; that said superior court and said Mason Irwin, judge thereof, erroneously refused to permit these relators to make such proof, to which these relators duly excepted, and assigned said refusal as error.

5.

That on the 16th day of October, 1914, the said superior court, and Mason Irwin, judge thereof, erroneously made findings of fact and conclusions of law, to which these respondents severally duly excepted, which findings of fact in substance and effect are: That it was necessary for the proper use and enjoyment of the said Coats-Fordney Logging Company's said lands, and for the removal of the timber thereon, to have and maintain a private way of necessity over and across the northwest quarter of said section 32 for the purpose of constructing and maintaining a private logging railroad in order to take over said right of way and said railroad the timber products of said lands, and that said

Coats-Fordney Logging Company had no other available or reasonably practical route over or through which to reach said timber lands with its said logging railroad, except the route sought to be acquired in said proceeding; and that it was necessary for said Coats-Fordney Logging Company to cross over and upon lands which it did not own, and over which it had no control, and through which it had no right of way for logging purposes; and that said court had jurisdiction of the subject matter of the action; and that said Coats-Fordney Logging Company had attempted to come to an amicable agreement with these relators, but had been unable to reach an agreement.

6.

That said superior court and Mason Irwin, judge thereof, erroneously on said 16th day of October, 1914, ordered and adjudged that the said Coats-Fordney Logging Company was entitled to condemn and appropriate said proposed right of way for the purpose of constructing thereon its said private logging railroad, together with spurs, switches, sidings and other improvements, for the removal of any and all timber products upon said section 30, section 20, southwest quarter of section 8 and southwest quarter of section 10, and that said cause be set down for trial for the assessment of damages for the taking, damaging or injuriously affecting the relators' said property, and the compensation to be made in money for the damage therein by the Coats-Fordney Logging Company, and said cause was set down for trial by jury on October 26, 1914.

7.

That the said superior court, and Mason Irwin, judge thereof, at the request of petitioner made findings of fact as follows:

2.

"That the petitioner owns section 30 in said township 19 north range 8 west. That said section contains about 16,000,000 feet of merchantable timber; that the east fork of the Wishkah river is distant from the west line of said lands about 200 feet.

3.

"That section 20 in said township 19 north range 8 west, contains about 20,000,000 feet of merchantable timber; that said land is distant from the east fork of the Wishkah river at the nearest point, about one-half mile.

4.

"That the southwest quarter of section 8 in said township is owned by petitioner; that the east fork of the Wishkah river touches one corner of said lands and the same can be logged into said river; that no necessity exists for condemning the right of way for the removal of the timber from said southwest quarter of section 8, if it is considered as a tract separate from the other lands of petition. That there is about 4,500,000 feet of merchantable timber upon said land."

8.

That said superior court, and Mason Irwin, judge thereof, although requested so to do by these relators, refused to find:

5.

"That the southwest quarter of section 10 in said township is owned by petitioner, and contains about 12,000,000 feet of merchantable timber. That

same can be logged into the east fork of the Wishkah river at a distance at the nearest point of about one mile, and that same can be logged much more easily and cheaply into said river than by petitioner's proposed railroad; that no necessity exists for condemning a right of way for the removal of the timber from said southwest quarter of section 10.

6.

"That none of the petitioner's said lands are of value other than for the timber thereon. That at the rate the petitioner's logging operations have been, or, can and will be carried on, all of said timber will be removed within the period of about one year.

7.

"That the petitioner has a friendly understanding with the Weyerhauser Timber Co., which is the owner of the northeast quarter of section 31 in township 19 north range 8 west, whereby, upon request, it can and has obtained the right to extend its road across said lands into section 30, township 19 north range 8 west.

8.

"That no absolute necessity exists for the crossing by petitioner of the northwest quarter of section 32, township 19 north range 8 west.

9.

"That each of the tracts of land owned by petitioner can be logged into the east fork of the Wishkah river by crossing lands belonging to the Weyerhauser Timber Co.; that the relations between the petitioner and said Weyerhauser Timber Co. are such that upon mere request, it can obtain the right to cross said Weyerhauser Timber Co.'s lands.

10.

"That it is feasible to log all of petitioner's timber upon all of petitioners said lands into the east fork of the Wishkah river. That the cost thereof would not be greater than by logging the same by means of the petitioner's proposed logging railroad.

11.

"That the east fork of the Wishkah river, and the Wishkah river, are navigable streams down which large quantities of logs have been removed from lands similarly situated to the lands of the petitioner; that said river affords an easy, quick and cheap way of conveying logs to the market upon Grays Harbor."

9.

That thereupon and on October 17, 1914, and within five days after the making of said findings of fact, and order and decree of condemnation, and refusal to make such findings proposed by these relators, these relators severally duly excepted in writing to said findings, order and judgment and refusal to make findings, as follows:

1.

"The respondents, Grays Harbor Logging Company and W. E. Boeing severally except to the finding of fact numbered 1, contained in the order and decree of condemnation, and to each and every specific fact found therein.

2.

The respondents, Grays Harbor Logging Company and W. E. Boeing severally except to the finding of

fact numbered 4, contained in the order and decree of condemnation, and to each and every specific fact found therein.

3.

The respondents, Grays Harbor Logging Company and W. E. Boeing severally except to the finding of fact numbered 5, contained in the order and decree of condemnation, and to each and every specific fact found therein.

4.

The respondents, Grays Harbor Logging Company and W. E. Boeing severally except to the finding of fact numbered 6, contained in the order and decree of condemnation, and to each and every specific fact found therein.

5.

The respondents, Grays Harbor Logging Company and W. E. Boeing severally except to the finding of fact numbered 7, contained in the order and decree of condemnation, and to each and every specific fact found therein.

6.

The respondents, Grays Harbor Logging Company and W. E. Boeing severally except to the finding of fact numbered 8, contained in the order and decree of condemnation, and to each and every specific fact found therein.

7.

The respondents, Grays Harbor Logging Company and W. E. Boeing severally except to the finding of fact numbered 9, contained in the order and decree of condemnation, and to each and every specific fact found therein.

8.

The respondents severally except to the finding of fact numbered 10, and to the order and decree contained therein.

9.

The respondents except to the refusal of the court to make and find the respondents' proposed finding of fact number 2, as proposed by respondents, and to the refusal of the court to find that the easiest and cheapest way to log said section 30 is into the east fork of the Wishkah river.

10.

The respondents except to the refusal of the court to make and find the respondents' proposed finding of fact number 3, as proposed by respondents, and to the refusal of the court to find that the easiest and cheapest way to log said section 20 is into the east fork of the Wishkah river.

11.

Respondents except to the refusal of the court to find respondent's proposed finding of fact number 4, and to the refusal of the court to find that the east fork of the Wishkah river runs through said lands, and to the refusal of the court to find that the southwest quarter of section 8 can be logged more cheaply and easily by the river than by railroad.

12.

Respondents except to the refusal of the court to make respondents' proposed finding number 5.

13.

Respondents except to the refusal of the court to make respondents' proposed finding number 6.

14.

Respondents except to the refusal of the court to make respondents' proposed finding number 7.

15.

Respondents except to the refusal of the court to make respondents' proposed finding number 8.

16.

Respondents except to the refusal of the court to make respondents' proposed finding number 9.

17.

Respondents except to the refusal of the court to make respondents' proposed finding number 10.

18.

Respondents except to the refusal of the court to make respondents' proposed finding number 11.

A. M. ABEL,
Attorney for Grays Harbor Logging Company,

W. H. ABEL,
Attorney for W. E. Boeing,
Respondents.

10.

That the relators claim and allege that the said superior court, and Mason Irwin, judge thereof, errone-

ously decided that the lands of these relators was subject to condemnation for said alleged private way of necessity and said attempted condemnation did not violate the constitution of the state of Washington, and the constitution of the United States, and erroneously decided said cause against the weight of evidence to the effect that said proposed right of way was not reasonably necessary for the removal of the timber upon the said Coats-Fordney Logging Company's said lands.

Wherefore, These relators pray that a writ of review be issued by this court, directed unto said superior court, and Mason Irwin, judge thereof, to certify fully to this court at a specified time and place a transcript of the record and proceedings in said cause, that the same may be reviewed by this court, and requiring the respondents in the meantime to desist from further proceeding in the matter to be reviewed.

Grays Harbor Logging Company,
W. E. Boeing, *Relators.*
W. H. ABEL & A. M. ABEL,
Attorneys for Relators.

State of Washington,
County of Chehalis, ss:

A. M. Abel being first duly sworn, on oath, deposes and says: That he is attorney for the Grays Harbor Logging Company, one of the relators herein; that he makes this verification on its behalf and is authorized so to do; that he has read the foregoing petition, knows the contents thereof, and that the several allegations therein contained are true as he verily believes.

A. M. ABEL.

Subscribed and sworn to before me this 20th day of October, 1914.

EUNICE FLYNN,
Notary Public for Washington, residing at Montesano.

State of Washington,
County of Chehalis. ss:

W. H. Abel, being first duly sworn on oath, deposes and says: That he is attorney for W. E. Boeing, one of the relators herein; that he makes this verification on his behalf and is authorized so to do; that he has read the foregoing petition, knows the contents thereof, and that the several allegations therein contained are true as he verily believes.

W. H. ABEL,

Subscribed and sworn to before me this 20th day of October, 1914.

EUNICE FLYNN,
Notary Public for Washington, residing at Montesano.

INDORSED:

Petition. Service of within petition admitted by receipt of a true copy thereof this 20th day of October, 1914.

BRIDGES & BRUENER,
Attorneys for Coats-Fordney Log. Co.

NO. 12450.

DEPARTMENT TWO.
Filed Dec. 11, 1914.

THE STATE OF WASHINGTON, *ex rel.* GRAYS HARBOR LOGGING COMPANY *et al, Relators,*

vs.

SUPERIOR COURT FOR CHEHALIS COUNTY *et al., Respondents.*

The purpose of this action was to acquire by condemnation a private way of necessity. After a hearing the trial court entered a judgment sustaining the right to condemn. To review this judgment the cause is brought here by certiorari.

The facts are substantially as follows: The relators are the owners of the NW¼ of Section 32, Twp. 19 N., R. 4 W. W. M. in Chehalis County, Wash. The respondent, Coats-Fordney Logging Co., is the owner of sections 30 and 20, the SW¼ of Sec. 10, and the SW¼ of Sec. 8, in the same township. The Weyerhaeuser Timber Co. is the owner of Sec. 31, likewise in the same township. The lands of the Coats-Fordney Logging Co. have upon them large quantities of valuable timber, all of which lands and timber lie to the north of the NW¼ of Sec. 32, owned by the relators. For some years the Coats-Fordney Logging Co. had been engaged somewhat extensively in the business of logging. In the prosecution of this business it has constructed a logging railroad, now about 6½ miles in length. The lower terminus of this logging road is at tide-water in the Wishkah river. This river flows, generally speak-

ing, in a southwesterly direction. Some miles to the east, or southeast of it the Wynoochee river flows in the same general direction. The logging railroad constructed by the Coats-Fordney Logging Co. follows the divide or crown of the ridge between these two rivers. The upper terminus of the road is now at some point in the S½ of Sec. 31, which is owned by the Weyerhaeuser Timber Co. By this condemnation the Coats-Fordney Logging Co. desires to extend its road across the NW¼ of Sec. 32, owned by the relators, and thence in a generally northeasterly direction, for the purpose of logging from the lands above mentioned owned by it. The SW¼ of Sec. 8, owned by the Coats-Fordney Logging Co. is adjacent to the east fork of the Wishkah river. This is a navigable river for the purpose of floating logs to tide-water. None of the other lands owned by the Coats-Fordney Logging Co., are upon the river.

Upon the trial the relators contended, that instead of following the divide and passing through the NW¼ of Sec .32, there was a feasible route over which a road could be constructed at a reasonable cost across the N½ of Sec. 31 directly into Sec. 30, and thus avoid crossing the relators' land.

There are three questions in this case: 1. Was a way across the N½ of Sec. 31 sufficiently practicable and available to the Coats-Fordney Logging Co. to deny it the right to condemn a way of necessity across the land of the relators? 2. Was the fact that the SW¼ of Sec. 8 was upon the east fork of the Wishkah river a sufficient reason to deny the right of condemnation so far as it pertained to reaching that particular tract

of timber? And 3. Does the law which gives the right to condemn a private way of necessity offend against the due process of law clause found in the 14th amendment to the Federal Constitution?

I. The relators claim that instead of seeking to condemn across their land, the NW¼ of Sec. 32, that the road should be extended north through the N½ of Sec. 31. As appears from the facts stated, this latter section was not owned by the Coats-Fordney Logging Co. Upon the trial the relators offered evidence to show "that it is entirely feasible to cross section 31 at a reasonable cost in the building of a logging railroad, to run north to section 20 and 30 and the SW¼ of Sec. 10 and the SW¼ of Sec. (8), all in 19-8." This evidence the trial court declined to receive. This it is claimed was error.

The general rule is, that where a public service corporation is seeking to condemn land, that those invested with the power of eminent domain have the right in the first instance to select the land which, according to their own views, is most expedient for the enterprise, but that the court is invested with power to determine whether specific land proposed to be taken is necessary, in view of the general location, and to finally determine the question of necessity for taking such specific land when there is evidence of bad faith or oppression or an abuse of power in the selection. In order to overcome the *prima facie* case made by the condemnors, it is necessary to show by clear and convincing evidence that in the selection of the proposed route there was bad faith, oppression, or an abuse of power. In *State ex rel. Postal etc. Co. v. Superior Court,* 64 Wash. 189, it was said:

"We believe that the correct construction of this statute is that those invested with the power of eminent domain have the right in the first instance to select the land, which, according to their own views, is most expedient for the enterprise, and that it invests the court with the power to determine whether specific land proposed to be taken is necessary in view of the general location, and to finally determine the question of necessity for the taking of such specific land when there is evidence of bad faith, or oppression, or of an abuse of the power in the selection. Plainly, the selection by the condemnor is evidence of the highest character that the land selected is necessary for the enterprise, and in the absence of clear and convincing evidence to the contrary, it conclusively established the necessity. It is sufficient to make a strong *prima facie* case, but when convincing evidence is adduced by the owner that the land sought is not reasonably necessary, and that a slight change of location to other of his land will equally meet the necessity of the taker and be of much less damage to the owner, then it is incumbent upon the taker to rebut such evidence, since the refusal to make such change, if unexplained would amount to oppression and be an abuse of the power. *In re Field*, 61 App. Div. 618, 70 N. Y. Supp. 677."

The necessity being first shown, there seems no good reason why the rule of that case should not apply when the purpose of the condemnation is to acquire a private way of necessity. The reasons which support the rule in the one case would also seem to support it in the other. The respondents claim that that case is inapplicable, because there the question was the change of route over the same owner's land, while here the proposed different route is over the land of an owner not a party to the proceeding. It will be assumed but not

decided that the rule is applicable when the proposed change of route would cross the land of a third party. The question then arises, should the evidence offered and rejected have been received. The evidence offered went no further than that the route over the north half of Sec. 31 was feasible, and that the road could be constructed there at a reasonable cost. This fell short of meeting the requirements of the rule. In order to justify the court in ordering the change of location of the proposed road, it was necessary to show, not only another route which was practicable and that the road could be constructed thereon at reasonable cost, but it was necessary to go further and show by clear and convincing evidence that in the selection of the route sought to be condemned there was bad faith, oppression, or an abuse of power. The evidence offered does not go to the extent of showing that the route selected by the condemnor causes unnecessary damage to the relators' property, and that the route over Sec. 31 would cause much less damage to that property than would the route selected cause to the relators' property.

But the relators claim that the respondents had a right by private agreement with the Weyerhaeuser Timber Co. to cross the N½ of Sec. 31. But we think the evidence does not go this far. It is true that one of the officers for the respondent company admitted that it had acquired the right through the S½ of Sec. 31 from the Weyerhaeuser Timber Co. without any difficulty, and that he presumed if they desired it they could acquire a route through the N½ thereof. The route which they had already acquired through the S½ of that section was the one which when extended would

cross the NW¼ of Sec. 32. If a route were acquired across the N½ of Sec. 31 it would be the result of future negotiations.

II. If the SW¼ of Sec. 8 which borders upon the east fork of the Wishkah river was the only property to be reached by the proposed road, it might well be held that there was not a sufficient reason to justify the condemnation of a private way of necessity for a logging road, since from that particular tract there is an adequate outlet by water. The statute provides that when land is so situated with respect to other land that it is "necessary for its proper use and enjoyment to have a private way of necessity," the right of condemnation exists.

Laws of 1913, Chap. 133, p. 412.

The word "necessary" as used in the statute means reasonable necessity.

Samish River Boom Co. v. Union Boom Co., 32 Wash. 586.

State ex rel. M. Timber Co. v. Superior Ct., 77 Wash. 585.

In determining whether a reasonable necessity exists for the condemnation, it is necessary to look at the entire enterprise rather than to its segregated parts. The Coats-Fordney Logging Co. was conducting its logging operations by means of a logging railroad. To log in this manner it was already equipped. Only one of the four tracts of land which it was seeking to reach was located upon the river. To sustain the right to condemn so far as it pertained to reaching the other three tracts of land and to deny it as to this one would not

seem very reasonable. The SW¼ of Sec. 8 was only one of the ten quarter sections included in the enterprise.

III. The relators' brief shows an exhaustive and painstaking investigation into the question as to whether the state statute giving the right to condemn for a private way of necessity offends against the due process of law clause in the 14th amendment to the Federal constitution. Were the question an open one in this state, it would present an interesting problem. In *State ex rel. Mountain Timber Co. v. Superior Court*, 77 Wash. 585, *supra*, it was expressly held that the statute giving the right to condemn a private way of necessity was not incompatable with due process of law as guaranteed by the Federal Constitution. That case was heard *en banc*, and the opinion was concurred in by all members of the court. The question is at rest so far as this court may be concerned.

The judgment will be affirmed.

(Signed) MAIN, J.

WE CONCUR:

(Signed) CROW, C. J.
(Signed) MOUNT, J.
(Signed) ELLIS, J.
(Signed) FULLERTON, J.

12450.

Filed Jan. 9, 1915.

C. S. REINHART, *Clerk*.

F. S. G.

PETITION FOR REHEARING.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATE OF WASHINGTON *ex rel.* GRAYS HARBOR LOGGING COMPANY and W. E. BOEING,
Relators,

vs.

SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY and MASON IRWIN, *Judge* thereof, and COATS-FORDNEY LOGGING COMPANY,
Respondents.

The Grays Harbor Logging Company and W. E. Boeing, relators herein, respectfully petition the court to grant a rehearing in this cause and submit in support thereof the following:

Southwest Quarter of Section Eight.

The east fork of the Wishkah river flows through this tract. If the Coats-Fordney Logging railroad is built, as proposed, it will be about a mile from the railroad to this land, with the river intervening. There is really no testimony that this tract would ever be logged by rail. The trial court held that, considering it as a separate tract, no necessity exists for furnishing a right of way to log the timber therefrom.

This court, in its opinion, discusses the meaning of "reasonable necessity" and holds that a reasonable necessity exists for logging the timber from this tract by rail. When one adequate public way exists, how can

there be a reasonable, or any, necessity for another way? Particularly is this true where the other way will be about a mile from the land.

The right to condemn for private way is of necessity granted by statute (assuming its validity) to the owners of lands, *not to the owners of logging railroads.* The foundation of the right is the ownership of land which lacks a way out whereby to remove the products of that land.

THE CONSTITUTIONAL QUESTION.

The application the court has made of the statute to justify the taking a right of way where a public way already exists, shows the danger of allowing a statute of this kind to stand as constitutional. As construed by this court, private property can be taken for a private way, not of necessity, but of alleged convenience, although there is a public way across the land at present. As construed by this court, the statute is one which authorizes the taking of private property for the private convenience of others. We believe the decision of the court stands alone in sustaining as constitutional such a proceeding.

We again urge a reconsideration of the point made, that the statute is in conflict with the federal constitution, and that the proceeding is one where our property is sought to be taken without due process of law for the private convenience of a private concern.

For these reasons, and for the reasons given in our opening and reply briefs, we respectfully request the

court to grant a rehearing and reverse the decree under review.

Respectfully submitted,

A. M. ABEL,
Attorney for Grays Harbor Logging Company,
W. H. ABEL,
Attorney for W. E. Boeing.

* * * * * * *

JUDGMENT.

NO. 12450.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

Monday, March 1, 1915.

STATE *ex rel.* GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, *Relators.*

vs.

SUPERIOR COURT OF CHEHALIS COUNTY and COATS-FORDNEY LOGGING COMPANY,
Respondents.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Chehalis County and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now on this 1st day of March A. D. 1915, on motion of Bridges & Bruener of counsel for respondents, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs; the petition for rehearing denied, and that the said

Coats-Fordney Logging Co. have and recover from the said Grays Harbor Logging Co. and W. E. Boeing the costs of this action taxed and allowed at Forty-six & 00-100 dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance herewith.

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Cooley's Blackstone, (Vol 1, 3d Ed.) 138.. .. ..Page 32.
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Gayetty vs. Bethune, 7 Am. Dec. 192.. .. ..Page 34.
Beaudrot vs. Murphy, 30 S. E825 (S. Car.).. .. .. .. Page 42.
Bradley vs. Pharr,, 19 L. R: VA. 647 La. Ann. .. .. Page 42:
Varner vs. Martin, 21W . Va534.. .. .. Page 42.
Bloodgood vs. M. & H: R : R: Co. 18 Wend. 58.. .. .. Page 42.
Burlemaque, Principles of Law, 145.. .. ..Page 42.
De Vattel's Law of Nations, 112.. .. .. Page 42.
Chespeake vs. Moreland, 104 S. W. 764 (Ky.).. .... ..Page 43:
Hench vs. Pritt, 57 S. E. 808 (W. Va).. .. .. Page 43.
In re: Schubert,, 114 N. W. (Wis.).. .. ..Page 43.
State ex rel Harris vs. Hanson, 115 N. W. 294 (Neb.)..43:
Howard Mills Co. vs. Schwartz Lbr. Co., 95 Pac. 559 (Kan) 43:
Session Laws, 1905, 124 .. .. Page 45.
Detroit vs. Parker, 181 U. S: 401.. .. .. Page 45.
Bankhead vs. Brown, 25 Iowa, 540.. .. ..Page 47.
Wilkinson vs. Leland .. .. Page 47:
Mo. Pac. Ry. Co: vs: Nebraska,, 164 U. S. 403.. .. ..Page 48.

Authorities Cited

On Page 31 are cited the following cases and authorities:

Pom. Mun. Law, 2nd. Ed. Sec. 674.
Wharton, Com. Am. Law, Sec. 572.
Demarest, Studies in Am. Jur. 10.
Bouvier's Law Dictionary, Emient Domain.
Broom's Legal Maxims, 3.
Weeks, Damnum Absque Injuria, Sec. 14.
Tiedeman, Real Property, Sec. 753.
Black, Const. Law, 2nd. Ed. 168.
Cooley, Const. Lim. 6th. Ed. 654.
Mills, Eminent Domain, Sec. 1.
Elliott, Roads & Streets, 3d. Ed. Sec. 14.
Dillon, Mun. Corp. Sec. 584.
1 Lewis, Eminent Domain, Sec. 1. 250.
Tiedeman, State & Federal Control, Sec. 141.
West River Bridge Co. vs. Dix, 6 How. 507.
2 Kent's Com., 5th Ed. 340.
1 Lewis Eminent Domain, 3rd. Ed. 520.

The following cases are cited on page 35:

Wilkinson vs. Leland, 2 Pet. 657.
Taylor vs. Porter, 40 Am. Dec. 274 (N. Y.)
Sadler vs. Langham, 34 Ala. 311.
Nesbit vs. Trumbo, 89 Am. Dec. 290 (Ill.)
Wild vs. Deig, 13 Am. Rep. 339 (Ind.)
Osborn vs. Hart, 24 Wis. 89.
Bankhead vs. Brown, 25 Ia. 540.
Whitham vs. Osburn, 4 Ore. 319.
Gillan vs. Hutchinson, 16 Cal. 154.
Cooper vs. Williams, 5 Ohio 393.
Dickey vs. Tennison, 27 Mo. 373.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 471

GRAYS HARBOR LOGGING COMPANY, *a corporation*, and W. E. BOEING,
Plaintiffs in Error,
vs.
COATS-FORDNEY LOGGING COMPANY, *a corporation, Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF WASHINGTON.

ANSWER BRIEF ON MOTION TO DISMISS, OR AFFIRM, AND TO PLACE ON SUMMARY DOCKET.

W. H. ABEL,
A. M. ABEL,
Attorneys for Plaintiffs in Error.

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MOTION TO DISMISS.

This plaintiff in error draws in question the constitutionality of an act passed by the legislature of the State of Washington, in 1913. Session Laws 1913, p. 412. By motion to dismiss, the defendant in error contends that the judgment upon which the writ of error is based, is not a final judgment, or decree, in a suit in the highest court

of the state in which a decision in the suit could be had, under section 237, of the Judicial Code. Whether or not such judgment is to be considered a final judgment depends upon the state practice. Section 2 of the act under discussion provides:

> "The procedure for the condemnation of land for private ways of necessity or for drains, flumes, or ditches under the provisions of this act shall be the same as that provided for the condemnation of private property by railroad companies."
>
> Session Laws, 1913, p. 412.

The general eminent domain statute, providing for the condemnation of private property by railroad companies is contained in 1 Remington & Ballinger, sec. 921, *et seq.* Section 925 thereof provides:

> "At the time and place appointed for the hearing of said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises, or other property described in said petition, have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises, or other property sought to be appropriated is really a public use, or is for a private prosecution of such enterprise, or the private use is for a

> private way of necessity, and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing the sheriff to summon a jury.

1 Remington & Ballinger, sec. 925.

Under said provision the defendant in error in this cause filed its petition to condemn, caused process notice to issue and had a hearing upon the questions involved at such hearing, viz: the questions of necessity and use. At the hearing, these plaintiffs in error by answer and by oral objection, questioned the constitutionality of the act because it violated the 14th amendment to the federal constitution, in that it contemplated the taking of private property solely for private use, and not for public use, public good, or public benefit. From the judgment deciding this, and all other questions against them, these plaintiffs in error did the only thing which they could do under the state practice—sued out a writ of review in the Supreme Court of Washington, raising the same objections, and therein that court decided each question, including the constitutional

question, against these plaintiffs in error. The decision of the State Supreme Court is found in 82 Wash. 503.

The finality of the judgment in question is well settled by the state practice. An appeal will not lie from such a judgment, not because the judgment is not final (as suggested by defendant in error) but because the general appeal statute is not applicable to eminent domain proceedings.

Western American Co. vs. St. Ann Co., 22 Wash. 158.

But because an appeal will not lie, the State Supreme Court has held that a writ of certiorari, or review, will issue to bring before that court for determination, the questions of use and necessity.

Seattle & Montana Ry. Co. vs. Bellingham Bay Co., 29 Wash. 491.

By repeated decisions the Supreme Court of Washington has held that, after the order or judgment of necessity has been rendered and a trial had to determine the amount of damages, then, that the only question that can be raised is as to the propriety and justness of the amount of

damages. This is the only question that can be raised or will be considered by the court.

State ex rel Pagett vs. Superior Court, 46 Wash. 35.
Fruitland Irrigation Co. vs. Smith, 54 Wash. 185.
Calispel Diking Dis. No. 1 vs. McLeish, 63 Wash. 331.
Seattle, Port Angeles vs. Land, 81 Wash. 209.
State ex rel Davis vs. Superior Court, 82 Wash. 34.

These cases are based upon the express provisions of the eminent domain statute:

> "Either party may appeal from the judgment for damages entered in the superior court to the Supreme Court of the state within thirty days after the entry of judgment as aforesaid, and such appeal shall bring before the Supreme Court the propriety and justness of the amount of damages in respect to the parties to the appeal."

1 R. & B. 931.

Thus in *Western American Company vs. St. Ann*, 22 Wash. 160, it was said:

> "The whole act seems to indicate that the question to be determined on appeal is the question of damages allowed."
>
> "It is also contended that the word 'propriety' in the statute which we have just cited, should be interpreted as meaning the legal right to ap-

propriate, but we do not doubt that the word was used by the legislature in the sense of propriety as to the amount of damages."

supra, 22 Wash. 161.

In *Fruitland Irrigation Co. vs. Smith*, 54 Wash. 185, on appeal from a judgment awarding damages in a condemnation proceeding, the court declined to consider any question, other than the amount of the award, and said:

"We shall not refer to errors alleged which do not go to the propriety or justness of the award, because such errors, if made, cannot be reviewed on this appeal." Western American Co. vs. St. Ann, 22 Wash. 158; 60 Pac. 158; Seattle & M. R. Co. vs. Bellingham Bay & E. R. Co., 29 Wash. 491, 69 Pac. 1107, 92 Am. St. 907."

supra, 54 Wash. 186.

Thus, on appeal in a condemnation proceeding by a diking district from a judgment awarding damages, the court declined to consider any other question than the propriety and justness of the amount of damages and declined to consider errors going to the validity of the organization of the district or regularity of the proceeding, and said:

"The respondent argues that an appeal only

brings before the court the 'justness of the amount of damage or the assessment of benefits in respect to the parties to the appeal.' It is our opinion that this objection is well taken."

Calispel Diking Dis. No. 1 vs. McLeish, 63 Wash. 331.

In the recent case of *Seattle, Port Angeles vs. Land*, 81 Wash. 209, an appeal from an award of damages in a condemnation proceeding, the court again declined to consider any question except the amount of damages, and said:

"The proceedings for condemnation by public service corporations are clearly defined by statute and well settled in practice. Upon petition and notice, a hearing is first had upon the questions of public use and necessity. This hearing necessarily involves the corporate capacity and the right to maintain the proceedings on the part of the petitioner as a public service corporation, the purpose for which the land is sought and its necessity for that purpose. Rem. & Bal. Code, 925 (P. C. 171, 176). These are questions for the court. From its decision thereon there is no appeal. Western Am. Co. vs. St. Ann, 22 Wash. 158, 60 Pac. 158; a review of these questions can only be obtained by certiorari. North Coast R. Co. vs. Gentry, 58 Wash. 80, 107 Pac. 1059; Whatcom Co. vs. Yellowkanim, 48 Wash. 90, 92 Pac. 892. The only question reviewable on appeal is "the propriety and justness of the amount of damages." Rem. & Bal. Code 931 (P. C. 171, 180a); Fruit-

land Irrigation Co. vs. Smith, 54 Wash. 185, 102 Pac. 1031; State ex rel Port Townsend Southern R. Co. vs. Superior Court, 44 Wash. 554, 87 Pac. 814. Having taken no action to review the preliminary order of the trial court by certiorari, the appellants here are foreclosed by the preliminary order as to all of the objections above mentioned."

supra, 81 Wash. 209.

In *State ex rel Davis vs. Superior Court*, 82 Wash. 31, where after a judgment for damages had been awarded, judgment *non obstante veredicto* was entered, denying damages, the court again considered the extent to which it would review a judgment, after verdict for damages in a condemnation proceeding, and said:

"The rule is settled in this state that, where a statute authorizes a restrictive appeal in special proceedings, the general statute does not apply. Western Am. Co. vs. St. Ann, 22 Wash. 158, 60 Pac. 158; State ex rel Elexander vs. Superior Court, 42 Wash. 684, 85 Pac. 673; State ex rel Port Townsend Southern R. Co. vs. Superior Court, 44 Wash. 554, 87 Pac. 814. In the case first cited, it was sought to review an order of appropriation by appeal. In holding that appeal did not lie, the court said:

"It is urged by the respondent that the appeal in this case cannot be entertained, for the reason that the statutory provision for an appeal in condemnation proceedings is limited

> to an appeal from the amount of damages. *We think this view of the law is correct.*"
>
> The statute there under review provided for an appeal from the judgment for damages and provided that the appeal shall bring before this court 'the propriety and justness of the amount of damages.' This view has since been followed."

supra, 82 Wash. 31.

It is clear that under the state practice the order or judgment or necessity and use is final and conclusive of all the questions involved in that branch of the case. Recently the State Supreme Court has held such judgment to be a final judgment. In *Chicago, M. & P. Ry. Co. vs. Slosser*, 82 Wash. 467, decided December 11th, 1914, (the same day on which this cause was decided in that court), the latest expression by the State Supreme Court, the court said:

> "The statute referred to seemingly contemplates the entry, during the court of the proceedings of three separate and distinct judgments, first (by Rem. & Bal. Code 925, P. C. 171, 176) a judgment finding that the contemplated use for which the property sought to be appropriated is really a public use, and the necessity for its taking for that use, second (by Id. 926, P. C. 171, 177) a judgment fixing the amount of the award that is made

to the owner of the property appropriated because of the appropriation, for the property actually taken and for other property damaged thereby, and third, (by Id. 927, P. C. 171, 178) '* * * * a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property, sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes.' From these three several judgments, a right of appeal is given by the statute itself only from the second, or the judgment for damages (Id. 931, P. C. 171, 180a) and as to this it is provided that 'such appeal shall bring before the Supreme Court the propriety and justness of the amount of damages in respect to the parties to the appeal,' and that if the owner of the property appropriated accepts the sum awarded, he shall be deemed thereby to have waived conclusively an appeal to the Supreme Court and final judgment by default may be rendered in the Superior Court as in other cases."

supra, 82 Wash. 470-471.

"While a judgment of appropriation is the final judgment in the sense that it comes last in the series, it is no more final in its conclusiveness than are the two which precede it. Each is final in its own particular sphere, and any rule that would allow an appeal from the judgment of appropriation, would, on like principles, allow an appeal from the judgment of public use and necessity."

supra, 82 Wash. 473.

Thus under the state practice the questions of necessity and use are distinct questions from the question of damages, and constitute a separate branch of the case in which a separate, distinct judgment is rendered, which judgment is final and conclusive upon said questions. Thereafter, in the terms of the state statute, (1 Remington & Ballinger sec 931), the only remaining question to be considered is the propriety and justness of the amount of damages and by "propriety" is not meant the legal right to appropriate.

> "It is also contended that the word 'propriety,' in the statute which we have just cited, should be interpreted as meaning the legal right to appropriate, but we do not doubt that the word was used by the legislature in the sense of propriety as to the amount of damages."
>
> *Western American Co. vs. St. Ann Co.*, 22 Wash. 161.

> "A final judgment or decree has been said to be one which disposes of the cause or of a distinct branch thereof, reserving no further questions or directions for future determination."
>
> 2 Ruling Case Law, sec 22.

> "A decree is none the less final because some future orders of the court may become necessary

to carry it into effect; nor because some independent branch of the same is reserved for further consideration."

Freeman, Judgments, sec 24 (4th Ed.).

"A final decree is one which determines and disposes of the whole merits of the cause before the court, or a branch of the cause, which is separate and distinct from the other parts of the case, reserving no further questions or directions for future determination; so that it will not be necessary to bring the cause or that separate branch of the cause, again before the court for further decision."

Teaff vs. Hewitt, 1 Ohio St. 520.

"A final judgment or decree may be said to be one which disposes of the cause, *or a distinct and definite branch thereof*, reserving no further questions or directions for future determination."

Williams vs. Field, 60 Am. Dec. 427 and note.

"Thus there may be two or more decrees in a suit, each of which is final for purposes of appeal. *Wynn vs. Tallapoosa Co. Bank*, 53 South. 228; 168 Atl. 469."

2 Words & Phrases, 541 (2nd Series)

"A final judgment that is conclusive of any question in a case is final as to that question. The Code provides for an appeal, *a* final judgment, not from *the* final judgment in an action."

Sharon vs. Sharon, 7 Pac. 463. (Cal)
State ex rel Heinze vs. District Court, 72 Pac. 616 (Mont.)

"A final decree is such a one as settles and adjudicates the questions in a case, and a decree may be final as to part of matters in litigation and interlocutory as to the others, *Cook's Heirs vs. Bay*, 5 Miss (4 How) 485, 486."

3 Words & Phrases, 2782.

Wheeling Belmont Bridge Co. vs. Wheeling Bridge Co., 138 U. S. 287, is exactly in point. There a judgment for the condemnation of property was held to be a final judgment against which a writ of error was properly sued out, although there, as here, the amount of damages was thereafter to be determined. The only difference between that case and case at bar is that there the Commissioners determined the amount of damages, while, under the Washington statute, a jury is empaneled to determine the amount. Thereon this court said:

"The defendant in error, the plaintiff below, moves in the alternative to dismiss the appeal on the ground that the judgment recovered is not final, or to affirm the judgment on the ground of the manifest insufficiency of the errors assigned. The essential points of contention in the case related to the necessity of the property for the purpose of the petitioner, and to its necessity to defendant for the proper exercise of its franchise. The judgment for the condemnation was conclusive upon

both particulars. A right to condemn, as held by the Supreme Court of the state is to be determined before the appointment of commissioners to estimate the amount of compensation to be made, *Baltimore & O. R. Co. v. Pittsburg W. & K. Ry. Co.* 17 W. Va. 812. If the judgment had been different all further proceedings would have been ended. Being for the condemnation, the estimate of the compensation, which was to follow, was to be made by commissioners to be appointed, and might therefore be treated as being a distinct proceeding."

So in case at bar, the inquiry as to the amount of damages is a separate and distinct branch of the case; from which a separate appeal lies and in which no question can be raised which is adjudicated by the judgment under consideration.

To the same effect:

State ex rel Chicago Oshkosh, 77 N. W. 193 (Wis.)
Petition of Philadelphia * * 53 Atl. 191 (Pa.)

Luxton vs. North River Bridge Co. 147 U. S. 338, cited by defendant in error, is not in point. In that case, commissioners were appointed to award damages in a condemnation proceeding under a statute and practice of New Jersey whereby a writ of certiorari could issue at *any*

stage in the proceeding. The order appointing the commissioners was interlocutory and not final. Under the Washington statute, and practice, the judgment of necessity and use is final, conclusive, and not reviewable by the state courts, except by a writ of review sued out at the time.

In the Luxton case it was not the intention to overrule *Wheeling B. Bridge Co. vs. Wheeling Bridge Co.* The court said:

> "The case of Wheeling B. Bridge Co. vs. Wheeling Bridge Co., cited by the plaintiff in error, is distinguishable from the present case. Jurisdiction of a writ of error to the Supreme Court of Appeals of West Virginia, affirming an order appointing commissioners under a somewhat similar statute, was there entertained by this court, solely because that order has been held by the highest court of the state to be an adjudication of the right to condemn the land and to be a final judgment, on which a writ of error would lie, and could therefore hardly be considered in any other light by this court in the exercise of its jurisdiction to review the decisions of the highest court of the state upon a Federal question (138 U. S. 287, 290; (34 :967, 968). To have held otherwise might have wholly defeated the appellant jurisdiction of this court under the constitution and laws of the United States, for if the highest court of the state held the order appointing commissioners to be final and conclusive unless appealed

from, and the validity of the condemnation not to be open on a subsequent appeal from the award of damages, it is difficult to see how this court could have reached the question of the validity of the condemnation, except by writ of error to the order appointing commissioners. That case, therefore, affords no precedent or reason for sustaining this writ of error to the circuit court of the United States."

supra, 147 U. S. 341.

MOTION TO AFFIRM

In support of the motion to affirm, part of the record has been printed in defendant in error's brief. The maps used in evidence are not contained therein and are really necessary to be considered to arrive at a proper understanding of the relative location of the lands, and of the river, and of the proposed logging road.

While this court adopts the construction placed by the highest court of the state upon a state statute, yet the court does not, as stated on page 22 of defendant in error's brief, accept the ruling of the state court, whether the statute is in violation of the federal constitution. What is decided in *Missouri Pacific Railway Co. vs. Nebraska*, 164 U. S. 403, is that the construction

placed by the highest court of the state upon a state statute will be the construction placed by this court on the same statute. Applying this test the act under attack, is unconstitutional. For the state supreme court thereunder justified the taking of our private property, although the defendant in error at this time has a highway over part of its lands at present. This applies particularly to the southwest quarter of section eight, and to a lesser extent to section twenty.

This other highway is the east fork of the Wishkah River, which is navigable and upon which a log and boom driving company, under the state statute is extensively engaged as a public service corporation in handling logs. The facts concerning said operations are fully set out in the evidence.

On the suggestion of the alleged bottling up of the state's resources, it is to be noted that under the toll logging road statute of 1905, Session Laws, 1905, p. 161, 2 Remington & Ballinger, 7106, any two or more persons may incorporate a company to construct, maintain and operate logging roads, chutes, flumes and artificial water courses, or waterways, or other ways in the transportation of logs and other timber products. Such a corporation is under the state law a *quasi* pub-

lic company and common carrier and has the right of eminent domain.

Therefore unless the defendant in error desires to operate its road purely as a private concern, it can handle all of its timber under the toll logging road statute. We emphasize this because defendant in error professes concern that the resources of the State of Washington will be bottled up.

Also we point out that the record shows that a boom and driving company for the handling of logs operates upon the east fork of the Wishkah River, and has spent large sums of money improving the navigability of the said river. In no event, will defendant in error undergo any private hardship by being denied the right to take our private property for its private use.

The question of violation of the federal constitution has been before the state supreme court twice: The first case, *State ex rel Moutain Timber Company vs. Superior Court*, 77 Wash., 585, the court discusses the question, saying:

> "The taking of private property for private use for the promotion of the general welfare, upon due notice and hearing and the payment of compensation, is not incompatible with due process of law, as guaranteed by the Federal constitution. *Head vs. Amoskeag Mfg. Co.*, 113 U. S. 9."

Head vs. Amoskeag Mfg. Co., 113 U. S. 9,

does not support the citation. That was a condemnation proceeding to condemn the right to maintain a mill dam under a state statute which provided a hearing and adjudication upon the question of public use. From the finding of the committee an appeal laid. Section 3, of the statute, General Mill Act, New Hampshire of 1868, chapter 20, provided:

> "If the court shall be of the opinion that the erection of said dam is *not of public use or benefit, the appeal should be dismissed.*"

Section 1 of the act provides:

> "Any person or any corporation, authorized by its charter so to do, may erect and maintain on his or its own land or upon land of another with his consent, a water mill and dam to raise the water for working it or for creating a reservoir of water and for equalizing the flow of the same, *for its use and of mills below, upon and across any stream not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed.*"
>
> *supra.*

Thus it appears that the supreme court in upholding the constitutionality of the act in case at bar, labored under a misapprehension as to what was decided by this court in *Head vs. Amoskeag.*

The only other case in which the question has been before the supreme court is the case at bar, and the court in its opinion, 82 Wash, 503, said:

> "III. The relators' brief shows an exhaustive and painstaking investigation into the question as to whether the state statute giving the right to condemn for a private way of necessity offends against the due process of law clause in the 14th amendment to the Federal constitution. Were the question an open one in this state, it would present an interesting problem. In *State ex rel. Mountain Timber Co. v. Superior Court, supra,* it was expressly held that the statute giving the right to condemn a private way of necessity was not incompatible with due process of law as guaranteed by the Federal constitution. That case was heard *en banc,* and the opinion was concurred in by all members of the court. The question is at rest so far as this court may be concerned."

That the statute in question, unlike that of *Head vs. Amoskeag,* is purely private in its scope, is disclosed in its title, which is:

> "RELATING TO PRIVATE WAYS OF NECESSITY: An Act relating to the taking of private property for private ways of necessity and for drains, flumes, and ditches on or across the lands of others for agricultural, domestic or sanitary purposes."
>
> Session Laws 1913, p. 412.

Also in section 1, of the Act, it is clear that

private use only is meant. Section 1 reads:

> "An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct and maintain any drain, flume, or ditch, on, across, over or through the land of such other, for agricultural, domestic, or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch as the case may be. The term 'private way of necessity,' as used in this act, shall mean and include a right of way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways, and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried."
>
> Session Laws 1913, p. 412.

The defendant in error, by its proceeding herein, seeks to acquire a right of way for a logging road in order to log several tracts of land widely separated from each other. These lands are described in its petition to condemn thus:

> All of section thirty; all of section twenty; the southwest quarter of section ten; and the south-

west quarter of section eight, all in township nineteen north, range eight west, in Grays Harbor County, formerly Chehalis County.

Taking up these tracts separately: The map in the record shows the east fork of the Wishkah River touches on the corner of the Southwest quarter of Section Eight. Said river is a navigable river, largely used for driving logs to market. It is a navigable highway under the laws of the State of Washington. The trial court made a finding as to this tract, as follows:

> "That the Southwest Quarter of Section 8 in said Township is owned by petitioner; that the east fork of the Wishkah River touches one corner of said lands and the same can be logged into said river; that no necessity exists for condemning the right of way for the removal of the timber from said Southwest quarter of Section 8, if it is considered as a tract separate from the other lands of petitioner. That there is about 4,500,000 feet of merchantable timber upon said land."

In the trial court, and by writ of review to the supreme court, we resisted the alleged constitutional right to condemn a right of way through our land to remove the timber from this tract—the southwest quarter of section eight. There is no necessity, public or private therefor. Indeed

the trial court found there was no necessity, if it be considered as a tract separate from the other lands. It is in fact, a tract separated from the other lands. It is distant one and a half to two miles. To go from one tract to the other it is necessary to cross the river, a navigable highway. If the statute, under attack, justifies, as the state supreme court says it does, the taking of our private property for the private purposes of the logging company, even though there is at present a navigable river and public highway touching the land, then it is submitted the statute is unconstitutional in its scope. It serves no public good, public use, public necessity, nor indeed any private necessity.

To a lesser extent the argument holds as to section thirty, which is within two hundred feet of the same river. The trial court found:

> "That the petitioner owns Section 30, in said Township 19 North, Range 8 West. That said section contains about 16,000,000 feet of merchantable timber; that the east fork of the Wishkah River is distant from the west line of said lands about 200 feet."

There is much testimony in the record that

this section can be logged cheaper by water than by railroad. In any event, no public use, nor public good, is served by taking our private property in order that this section be logged by railroad a longer distance instead of to the river two hundred feet from the west line of the land.

As to section twenty: The map shows this to be distant from the east fork of the Wishkah River one half mile. There is much evidence that it could be logged thereto at a reasonable cost. The trial court found as to this section:

> "That section 20 in said Township 19 North Range 8 West, contains about 20,000,000 feet of merchantable timber; that said land is distant from the east fork of the Wishkah River at the nearest point, about one-half mile."

Yet the defendant logging company, defendant in error, seeks to condemn our land by building a road a very much longer distance.

As to the southwest quarter of section ten: This tract at the nearest point is distant from the east fork of the Wishkah River slightly over a mile, whereas to log it by rail will require a road several miles long.

This is not a case of bottling up the resources

of the state of Washington. A navigable river, used for years in logging operations, runs through one quarter section, and alongside another section of this land. The state statute under attack, as construed by the state supreme court, permits a private owner for its private purpose, at its own discretion, to ignore a natural highway and force a way across a neighbor's land. It is submitted that no court has ever gone to such an extent to uphold, even a private way of necessity.

The defendant in error takes the position that the constitutionality of laws providing for private ways of necessity, have been upheld by this court. These cases are now considered.

Clark vs. Nash, 198 U. S. 361, construed a Utah statute which authorized an individual landowner to condemn a right of way across his neighbor's land for the enlargement of an irrigation ditch in order to irrigate his land. *The state statute declared the same to be a public use.* The court adopted the statutory declaration of public use.

In *Hairston vs. Danville & W. R. Co.*, 208 U. S. 606, a railroad company condemned land for

a new track. This was held not to be a private use. The opinion illustrates the attitude of this court.

> "We assume that, if the condemnation was for private uses, it is forbidden by the fourteenth Amendment."
>
> "The propriety of keeping in view by this court, while enforcing the fourteenth Amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justified, and acted upon in *Fallbrook Irrig. District vs. Bradley; Clark v. Nash;* and *Strickley v. Highland Boy Gold Min. Co., ubi supra.* What was said in these cases need not be repeated here. *No case is recalled where this court has condemned,* as a violation of the fourteenth Amendment, a *taking upheld by the state court as a taking for public uses in conformity with its laws.*"

In *Strickley vs. Highland Boy Mining Co.*, 200 U. S. 525, the court sustained a condemnation proceeding whereby a right of way was condemned across a placer mining claim, for the aerial bucket line of a mining corporation. Here, also, the statute provided that such use was a public use.

Fallbrook Irrigation Dist. vs. Bradley, 164 U. S. 112 holds that the use of water for irrigation under a California statute is a public use;

that the policy of the state of California was that irrigation of arid lands is a public purpose, and that the water thus used is put to a public use. The court says:

> "It is obvious, however, that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which character of the use is questioned."

In *Louisville & N. R. Co. vs. Central Stock Yards Co.*, 212 U. S. 150, was involved the right to compel a common carrier to interchange cars and share its terminal facilities with a rival carrier. It was held this could not be done, and that the same would be a taking of property without due process of law. In the dissenting opinion of Judge McKenna it was said:

> "And this court, yielding also to that purpose, has recently declared that a state might, in order to meet new conditions, elevate into a public use of property that which, under other conditions, had universally been held to be a private use."

Jackson vs. Lamphire, 7 Law Ed. 769 was an ejectment action and lacks application.

Head vs. Amoskeag, 113 U. S. 9, has heretofore been considered. The statute there sustained

was a public use statute, and decision is based on another ground, viz., the right of the state to regulate the use of its streams.

To uphold the statute under attack, this court must go farther than it has yet gone in the decisions cited. Here the taking is avowedly for a private use. Neither the state legislature, nor the state courts, has made any declaration of public use, public necessity, public good, or public welfare. The bald proposition is now presented that a private concern can take private property of another because he needs it; or because he prefers not to use the navigable highway at hand.

It is argued that the welfare of the state is at stake; that to hold the act unconstitutional will result in bottling up the resources of the state. The act in question was passed in 1913, twenty-five years after admission to statehood. During this period the state of Washington has had a wonderful growth; its resources have been utilized and developed. They have not been years of private bottling up.

The right of eminent domain, which is inherent in sovereignty, is the right to take private

property for public use. The right is based upon the Roman maxim: *salus populi suprema lex.* The good of the people is the supreme law. It is embodied in that provision in Magna Charta that no man shall be dispossessed of his life, liberty or process, save by a judgment of his peers, or the law of the land.

The theoretical law writers, and the courts, agree that the power of eminent domain is the power to take private property for public use. The power does not involve the taking of private property for private use.

Pom. Mun. Law, 2nd. Ed. Sec. 674.
Wharton, Com. Am. Law, Sec. 572.
Demarest, Studies in Am. Jur. 10.
Bouvier's Law Dictionary, Emient Domain.
Broom's Legal Maxims, 3.
Weeks, Damnum Absque Injuria, Sec. 14.
Tiedeman, Real Property, Sec. 753.
Black, Const. Law, 2nd. Ed. 168.
Cooley, Const. Lim. 6th. Ed. 654.
Mills, Eminent Domain, Sec. 1.
Elliott, Roads & Streets, 3d. Ed. Sec. 14.
Dillon, Mun. Corp. Sec. 584.
1 Lewis, Eminent Domain, Sec. 1. 250.
Tiedeman, State & Federal Control, Sec. 141.
West River Bridge Co. vs. Dix, 6 How. 507.
2 Kent's Com., 5th Ed. 340.
1 Lewis Eminent Domain, 3rd. Ed. 520.

In *Cooley's Blackstone*, (Vol 1, 3d. Ed.), 138, the inherent right of private property is discussed and recognized. Cooley's note to the text holds that it is well settled that the government has no right to take the property of one citizen and transfer it to another, even for full compensation.

Broom, *supra*, shows the right of eminent domain is based upon the maxim of the Roman law: *salus populi suprema lex.*

Pomeroy, *supra*, says:

"The right of eminent domain is that right which the Government possesses to take the private property of an individual, and appropriate it to a public use. It is based upon that supreme authority which the state, the entire body politic, holds over all its members; it flows from the principle that the rights and convenience of an individual *must yield to the higher necessities or convenience of the whole.*"

Cooley, *supra*, says:

"The public use implies a possession, occupation, and enjoyment of the land by the public at large or by public agencies; and a due protection to the rights of private property will preclude the Government from seizing it in the hands of the owner, and turning it over to another, on vague grounds of public benefit, to spring from the mere profitable use to which the latter may devote it."

Weeks, *supra*, cites approval to English cases thus:

> "And for the public utility, the legislature may interfere with private property, and compel the owner of land to alienate his possessions, on receiving a reasonable price and compensation; but the power is not to be exercised to a greater extent than is absolutely necessary for the public welfare."

Tiedeman, State & Federal Control, *supra*, says:

> "The authorities are unanimous in the recognition of the abstract proposition, that the legislature cannot in the exercise of the right of eminent domain, even when the compensation is made on the most liberal terms, take the land from a private owner and appropriate it to any but a public use."

Mills, Eminent Domain, *supra*, says:

> "The power of the sovereign to condemn private property for public use."

Dillon, *supra*, defines eminent domain as follows:

> "The right of every government to appropriate, otherwise than by taxation and its police authority (which are distinct powers), private property for public use."

Lewis, Eminent Domain, *supra*:

> "Eminent domain is the right or power of a

sovereign state to appropriate private property to particular uses, for the purpose of promoting general welfare."

Wharton, Com. Am. Law, *supra*, says:

"Eminent domain, therefore, in the sense in which the term is used in this relation, is the right of a sovereign to appropriate private property for public purposes when required by public need, proper compensation being made therefor. In the states, the right of eminent domain resides in the state itself, as represented by its specific government."

Kent, in 2 Kent's Com. *supra*, said:

"I apprehend that the decision of the court was founded on just principles, and that taking private property for private uses, without the consent of the owner, is an abuse of the right of eminent domain, and contrary to fundamental and constitutional doctrine in the English and American law."

At the time our state constitution was adopted the right of eminent domain, as shown by the foregoing statements by text writers, was merely the right to take private property for public use. Later, we shall discuss what is meant by public use. Here we note that a private way of necessity, as known to the common law, was an easement arising by grant, or by estoppel.

Schulenbarger vs. Johnstone, 64 Wash. 202.
Gayetty vs. Bethune, 7 Am. Dec. 192.

We now undertake to show by decisions of the courts that at the time the fourteenth amendment to the federal constitution was adopted, the power of eminent domain was never exercised to take property for private use. This confirms the uniform view of text writers that private property can be taken only for some public use.

Wilkinson vs. Leland, 2 Pet. 657.
Taylor vs. Porter, 40 Am. Dec. 274 (N. Y.)
Sadler vs. Langham, 34 Ala. 311.
Nesbit vs. Trumbo, 89 Am. Dec. 290 (Ill.)
Wild vs. Deig, 13 Am. Rep. 339 (Ind.)
Osborn vs. Hart, 24 Wis. 89.
Bankhead vs. Brown, 25 Ia. 540.
Whitham vs. Osburn, 4 Ore. 319.
Gillan vs. Hutchinson, 16 Cal. 154.
Cooper vs. Williams, 5 Ohio 393.
Dickey vs. Tennison, 27 Mo. 373.

In *Wilkinson vs. Leland, supra*, the Supreme Court of the United States, speaking by Story, J., said:

> "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming

that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people."

In *Taylor vs. Porter*, *supra*, the Supreme Court of New York, speaking by Bronson, J., said:

"But the question does not necessarily turn on the section granting legislative power. The people have added negative words, which should put the matter at rest. 'No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers'; Const., art. 7, sec. 1. The words, 'By the law of the land,' as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with' the 'legislative power of the state,; but no one shall be disfranchised or deprived of any of the rights or privileges' of a citizen, unless you pass a statute for that purpose'; in other words, 'You shall not do the wrong, unless you choose to do it.' The section was taken with some modifications from a part of the twenty-ninth chapter of Magna Charta, which provided, that no freeman should be taken, or imprisoned, or be dis-seized of his free hold, etc., but by lawful judgment of his peers, or by the law of the

land. Lord Coke in his commentary upon this statute says, that these words 'by the law of the land,' mean 'by due course and process of law'; which he afterwards explains to be, 'by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law.' 2 Inst. 45, 50."

In *Sadler vs. Langham, supra,* the Supreme Court of Alabama said:

"Another, and perhaps more valuable provision of our constitution, declares that the citizen shall not be deprived, of his 'property, but by due course of law.' Without intending, at this time, to define the full meaning of the constitutional phrase, due course of law, it evidently does not mean a transfer of property by mere legislative edict, from one person to another. Nor will the usurpation be healed, by bringing a judicial tribunal to sit as a passive witness to the ceremony. The due course of law, by which a citizen may be deprived of his property, is something more substantial than this,—*Dorman vs. The State,* at the present term (34 Ala. 216).

We feel justified in laying down the following rules:

1. The legislature cannot, either with or without compensation, take private property for private use.—1 Bl. Com. 139; *B. & L. R. Cor. vs. S. & L. R. Co.,* 2 Gray 137 (61 Am. Dec. 444); *Taylor vs. Porter,* 4 Hill, 140 (40 Am. Dec. 274); *Embury vs. Conner,* 3 N. Y. 511 (53 Am. Dec. 325); *Ten Eyck vs. D. & R. C. Co.,* 18 N. J. Law, 200 (37 Am. Dec. 233); *Varvick vs. Smith,* 5 Paige 137

(28 Am. Dec. 417); *Parham vs. Justices, etc.*, 9 Ga. 341; *Hall vs. Boyd*, 14 Ga. 1; (*Ex parte Martin*) 13 Ark. 198 (58 Am. Dec. 321); *Wilkinson vs. Leland*, 2 Pet. 657 (7 L. Ed. 542)."

In *Nesbitt vs. Trumbo, supra*, the Supreme Court of Illinois, after citing many cases holding that it was against the law of the land to take private property for private use, said:

"These, so far as we have had time for examination, are the cases in which the principle has been applied under constitutional provisions, if not similar, substantially the same as those contained in ours. And they seem to fully sustain the objection that the law is unconstitutional, and that the legislature is powerless to afford the means by which a person can procure the right of way over another person's land without his consent. His right seems to be supreme, except where it is needed for public use, and then he must be compensated before it can be taken.

Nor can there be the slightest pretense in this case that this way was, in any just sense, for public use. It was alone for individual or private use. From these decisions, the doctrine seems to be too well and firmly established, whatever may have been our preconceived opinions, to be now shaken. And to hold that the legislature might exercise this power would doubtless open the way to other and more serious encroachments upon the right of property, which was designed to be secured by this most salutary provision. In the light of these authorities, we feel compelled to

hold this provision of the law unconstitutional."

In *Wild vs. Deig, supra,* the Supreme Court of Indiana condemned as unconstitutional, a law authorizing eminent domain proceedings to obtain a private way of necessity, and said:

> "The constitutionality of the provision depends upon the power of the legislature to authorize the appropriation under the right of eminent domain. In the case of the *Water Works Co. etc. vs. Burkhard,* 41 Ind. 364, it was said, that 'the right of eminent domain, that is, the ultimate right of the sovereign power to appropriate, not only public property, but the private property of all the citizens within the territorial sovereignity, to public purposes, is inherent in the government. * * * It is to be exercised only when the public exigencies require it. * * * If the legislature attempts, under the power of taking property under the right of eminent domain, to take property confessedly not for public use, then the courts may prevent it.' Mr. Cooley, in his work on Constitutional Limitations, says: 'It is conceded on all hands that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit. * * * It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such a case would be the property of him for whom it was established.'"

In *Osborn vs. Hart, supra,* the Supreme Court of Wisconsin, in denying that a private way of necessity could be obtained by eminent domain proceedings, said:

> "When, therefore, land is taken for a private road, under our statute, it is taken for a private and not a public use; the public has no right to use the road, but it is laid out solely for the benefit and convenience of the applicant. In some of the states it has been held that these roads, although termed private, yet were in fact public roads so far as the right to use them was concerned, and upon this ground the power of the legislature to authorize them to be laid out has been sustained,"—
>
> "But this question whether the legislature can authorize private roads to be opened through the land of persons not consenting thereto, even upon making compensations, has been so fully discussed in *Taylor vs. Porter, supra; Sadler vs. Langham,* 4 Ala. 311; and *Dickey vs. Tennison,* 27 Mo. 373, that further remarks here seem to be unnecessary. These cases, and many others which might be cited to the same point, while fully recognizing the doctrine of eminent domain, by which private property may be appropriated to the public use upon compensation being made therefor, still deny that it can be taken for strictly private purposes without the consent of the owner, whether compensation is made or not. And it seems to us that the assertion of a right on the part of the legislature to take the property or one citizen and transfer it

> to another, even for a full compensation, where the public interest is not promoted thereby, is claiming a despotic power, and one inconsistent with every just principle and fundamental maxim of a free government."

In *Witham vs. Osborn, supra,* the Supreme Court of Oregon held that it was contrary to the law of the land to permit condemnation for a private way of necessity and said:

> "All separate interests of individuals in property are held by the government under the tacit agreement, or implied reservation, that the property may be taken for public use upon paying a fair compensation therefor, whenever the public interest or necessities require that it should be so taken. The right of eminent domain does not however, imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for full compensation, when the public interest will in no way be promoted by such transfer."

In *Gillan vs. Hutchinson, supra,* the Supreme Court of California, said:

> "The legislature has no power to take the property of one person and give it to another."

In *Bankhead vs. Brown, supra,* Judge Dillon, in holding a private way statute to be unconstitutional, relied on the constitutional provision that no person shall be deprived of life, liberty or

property without due process of law, and said:

> "Wherever, by any well-considered decision, private roads have been sustained, it was because they were regarded as public in their character; and if properly so regarded, laws authorizing their establishment would doubtless be valid.

The following cases hold that a private way of necessity cannot be obtained by eminent domain proceedings.

Beaudrot vs. Murphy, 30 S. E. 825 (S. Car.)
Bradley vs. Pharr, 19 L. R. A. 647 La. Ann.
Varner vs. Martin, 21 W. Va. 534.

In *Bloodgood vs. M. & H. R. R. Co.*, 18 Wend. 58, in considering the limitations upon the power of eminent domain, cited: *Burlemaque, Principles of Law*, 145, *Grotius*, *Boecler* and *Bynkerschoeck*, to the effect that the right of eminent domain is not to be exercised, "*Except in cases where it is absolutely necessary for the public good.*"

De Vattel's Law of Nations, 112, discusses the subject of eminent domain in connection with private property and says:

> "The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the eminent domain."

Chesepeake vs. Moreland, 104 S. W. 764 (Ky.)

Hench vs. Pritt, 57 S. E. 808 (W. Va.)

Thus, in Wisconsin, a strictly private drainage statute is unconstitutional, although a statute authorizing a drainage system for the public good has been upheld.

In re: *Schubert*, 114 N. W. 244 (Wis.)

So, in Nebraska, a law providing for drainage districts "whenever it will be conducive to the public health, convenience or welfare," held not to authorize formation of drainage district in furtherance of private interest.

State ex rel Harris vs. Hanson, 115 N. W. 294 (Neb.)

So, a grist mill which does not serve the public but is strictly private, cannot exercise the power of eminent domain.

Howard Mills Co. vs. Schwartz Lbr. Co., 95 Pac. 559 (Kans.)

Taking of land of one person either through taxation or eminent domain for the purpose of giving it to another is not for public purposes and is contrary to the basic and essential principles of free government.

Salisbury, 102 N. E. 619 (Mass.)

Private property can be condemned only for public use and the legislature cannot otherwise provide, nor make provision for just compensation.

Philadelphia Clay Co., 88 Atl. 487 (Pa.)

In those states which have sustained private way of necessity statutes, the decisions have been based either:

First: On the ground that the way is actually for public use, and usable by the public. Of this class are the following cases:

Maderia County vs. Raymond, 72 Pac. 915 (Cal.)
Sherman vs. Buick, 32 Cal. 242.
Latah vs. Peterson, 16 L. R. A. 81 (Idaho).

Second: Where the private way is for the individual to pass to perform some public duty, as: To attend a jury duty; to go to school, *etc.*

Sake vs. Nazer, 21 S. W. 583 (Ky.)
Robinson vs. Swope, 12 Bush 21 (Ky.)

No claim is made that the logging road sought to be built will serve any public purpose. It will be strictly private for the company's private use. The way could not be used by the public generally.

An unsuccessful attempt has been made on one occasion to amend our constitution so as to give the private logging roads the right to condemn. One of these proposed amendments is found in *Session Laws*, 1905, 124.

The defeat of these proposed amendments at the polls shows the state policy to be opposed to the alleged right sought to be exercised in this case. No public good, public interest, nor public use is served by the act, nor by its exercise.

Finally we submit that to take private property for private use is an unwarranted extension of a sovereign right, an arbitrary invasion of the right to private property. It was held, in *Detroit vs. Parker*, 181 U. S. 401:

> "The 14th Amendment to the Federal constitution operates to extend to the citizens and residents of the states the same protection of arbitrary state legislation affecting life, liberty and property as is afforded by the 5th Amendment against similar legislation by Congress."
>
> "But, as we have seen, roads established under the Iowa act of 1866 are private in their character and not public, and are, as to amendment and repairs, within the jurisdiction of the road or township officers."

Considerations of public good, public welfare, public interest have often been used to broaden the scope of the idea expressed in the phrase, public use. Some of the states, by constitution or statute, have declared that the irrigation of arid lands, the drainage of swamp lands, and the like, are public uses. Our own constitution recognizes that drains, flumes, and ditches are subjects of public use. With these matters we have no quarrel.

But a consideration of the statute under discussion shows it to be strictly private. The title is:

> "An Act relating to the taking of private property for private ways of necessity, and for drains, flumes and ditches on or across the lands of others for agricultural, domestic or sanitary purposes."

Statute 1913, p. 412.

The first section provides only for a private way of necessity. The third section recognizes the right of the person acquiring the private way of necessity to cease using the same.

Such a private way of necessity originates by the act of a private individual; it is at the cost of the private owner that it is constructed

and kept in repair; and may be abandoned at the pleasure of the private individual. By every test it is strictly private and not public. These tests are fully stated and discussed by Judge Dillon in *Bankhead vs. Brown*, 25 Iowa, 540.

The decision of the Supreme Court in *Wilkinson vs. Leland*, by Story, J., and the decisions by the several state courts show that it has always been considered subversive of the rights of private property to permit condemnation for private use. This principle was firmly established in Magna Charta. It was part of the laws of the land of England. It became part of the law of the land of the United States. It is within the protection of the fourteenth amendment to the Federal constitution. That amendment provides:

> " * * * Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This point—the right to take private property for private use—was considered by the United States Supreme Court in *Mo. Pac. Ry. Co. vs. Ne-*

braska, 164 U. S. 403. Therein it was said:

> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States."

We have seen that the reserved right of eminent domain possessed by the sovereign state is the right to take private property for public use, but not for private use; that the latter would be taking private property without due process of law, and contrary to the fourteenth amendment to the federal constitution.

MOTION TO PLACE ON SUMMARY DOCKET.

This motion is supported by the bare statement that

> " * * * any considerable delay in the final decision of this case will be very detrimental to the interest of the defendant in error."

The record discloses no such detriment. There are no special and peculiar circumstances shown by the record, or stated in the brief, why the cause should be taken up out of order. The case does not appear to come within the scope of the

class of cases which will be advanced under rule 26 of the Supreme Court rules.

The question as to the constitutionality of the state statute is an important one which should be considered upon the entire record, which is not yet printed. What is sought by the defendant in error is a radical extension of the eminent domain power, which extension is open to serious doubt.

It is respectfully submitted that the motion to dismiss is not well founded and that the motion to affirm should be denied at this time, and considered upon final argument upon the merits.

Respectfully submitted,

W. H. ABEL AND
A. M. ABEL,
Attorneys for plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 132.

GRAYS HARBOR LOGGING COMPANY, A CORPORATION, AND W. E. BOEING, PLAINTIFFS IN ERROR,

vs.

COATS-FORDNEY LOGGING COMPANY, A CORPORATION, DEFENDANT IN ERROR.

NOTES OF ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

My mind approaches this case from a somewhat different angle than so far suggested by counsel.

I find nothing in the Fourteenth Amendment which directly forbids the taking of private property, either directly by a State or through power delegated by it. I do find, however, that the right of eminent domain over privately owned lands was reserved by the several States as a sovereign right, and has been exercised by the different States in a great many different ways.

The State constitution of Washington, in section 16 of article I, provides:

> "Private property shall not be taken for private use except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes * * * Whenever an attempt is made to take private property for a use alleged to be public the question whether the contemplated use be really public should be a judicial question and determination as such without regard to any legislative assertion that the use is public."

The State legislature, by an act passed in 1915, provided

> "An owner or one entitled to the beneficial use of land which is so situated with respect to the land of another, that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity * * * may condemn and take lands of such other * * * The term 'private way of necessity' as used in this act shall mean and include a right of way on, across, over or through the lands of another for means of ingress or egress, and the construction and maintenance thereon of roads, logging roads, flumes, etc., over and through which timber, stone, and mineral or other valuable material and products may be transported and carried."

We have therefore a case where the right of eminent domain is a sovereign right reserved to the State of Washington, a declaration by the people of that State that private property should not be taken for private use, except for ways of necessity, and a declaration by the people of the State, through its legislature, that a logging road is a way of necessity to enable the owners of land to reach the market with their timber. We have a further method provided for the judicial ascertainment not only of the necessity of the taking, but of the damages to be paid therefor, and the presence of a Federal question in this case rests upon the very slim suggestion that the taking of a right of way in this case is for a strictly private use in which the people of the State have

no interest direct or indirect, and is, therefore, contrary to the due-process clause of the Fourteenth Amendment.

Personally, I do not believe the case presents a Federal question worthy the consideration and determination of this court.

Should it be otherwise, however, I believe counsel wholly fails to appreciate that, in a prosperous and growing country, being more and more thickly settled, with increasing industries and the necessity of conserving and promoting the development of all resources, the rights of all individual citizens, whether in their liberty of action, or their right of property, become more and more impressed with and subordinated to the rights and privileges of the people as a whole.

What a man may do living by himself on some isolated piece of land is entirely different from what he may do in a thickly settled community, and as the community grows in number the individual personal right of action becomes correspondingly limited and restricted.

We have all observed the tendency of this court to sustain as far as possible the "police power" of the several States. Only in exceptional cases has such power been restrained as violating the Fifth Amendment.

To my mind the police power of a State has exactly the same bearing upon the personal liberty of people as the right of eminent domain has to one's real property.

In this class of cases we find that a man has the right of ingress and egress to his home, and this right includes the right to bring provisions in and produce out. It would be disastrous to so hem a man in by privately owned land that he could not secure such a way of necessity, although the same is purely personal to him.

> In Fallbrook Irrigation District *vs.* Bradley, 164 U. S., 112;
> Clark *vs.* Nash, 198 U. S., 361,

it was held that a man may condemn a right of way to bring

water to irrigate his farm, a purely personal use, but, as said by the court:

> "To irrigate and thus bring into possible cultivation, those large masses of otherwise worthless lands, would seem to be a public purpose and a matter of public interest, not confined to the landowners or even to any one section of the State. The fact that the use of the water is limited to the landowner is not, therefore, a fatal objection to this legislation. * * * Irrigation is not so different from the reclamation of swamps as to require the application of other and different principles to the case."

Hairston *vs.* Danville, etc., R. R. Co., 208 U. S., 598;
Mo. Pac. R. R. Co. *vs.* Nebraska, 164 U. S., 403;
Union Lime Co. *vs.* C. & N. W. R'y Co., 233 U. S., 211,

all sustain the same principle as applied to spur tracks to privately owned plants, where the use was in a sense private but necessary for the welfare and progress of the general public.

> "The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question. The determination of this question by the courts has been influenced in the different States by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare and the long established methods and habits of the people."

Strickley *vs.* Highland Boy Gold Mg. Co., 200 U. S., 527,

held the same way as applied to an aerial bucket line to develop a placer mining claim.

> "In the opinion of the legislature and the Supreme Court of Utah, the *public welfare* of that State demands that aerial lines between the mines upon its

mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong."

Finally, in

Mt. Vernon-Woodbury Cotton Duck Co. *vs.* Alabama Interstate Power Company, 240 U. S., 30,

I find the close line of demarkation which I think counsel have overlooked.

"In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislation to exercise or delegate the power of eminent domain.

"But to gather the streams from waste and to draw from them energy, labor without brains, and so save mankind from toil that it can be spared, is to supply what, next to intellect is the very foundation of all our achievements and all our welfare. If that purpose is not public we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established."

Authorities might be multiplied as they are in our brief, but it must be reasonably clear from the opinions I have referred to that many different kinds of appropriations have been sanctioned under State laws, where the use was largely if not entirely private, but where the general welfare or progress of the people as a whole were directly involved.

These same authorities hold that the declaration of what is a public use or a way of necessity rests with the legislatures of the different States, and unless there be a clear abuse of the power, the State legislation as construed and interpreted by the Supreme Courts of the States will not be overruled by this court.

In the light of these authorities and remembering that the right of property is a legal and not a natural right, we find in this case:

An act by the State legislature declaring logging roads to be ways of necessity.

Decisions of the Supreme Court of the State declaring that such rights of way are in the interest of the public.

The fact that timber is one of the principal resources of the State of Washington and it would be against the interest of the people of that State to permit the owner of timber land to prevent access to a neighbor so that his timber must rot. I cannot improve on the statement made by the Supreme Court of Idaho October 3, 1916, in Blackwell Lumber Company *vs.* Empire Mill Co., Pacific Reporter, volume 160, page 265:

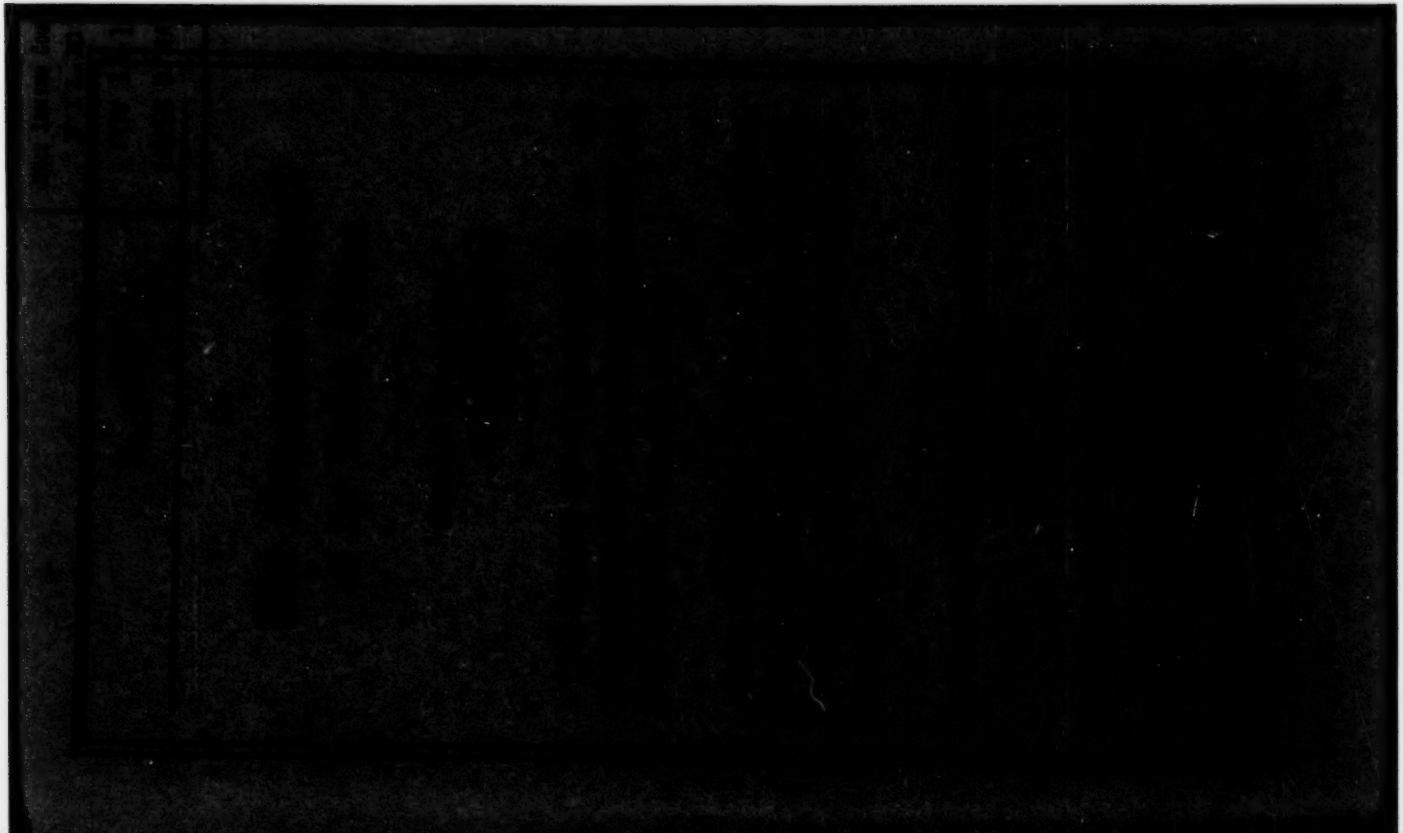
> "Upon an examination of the entire transcript in this case, we are convinced that there is but one feasible way for the respondent company to remove its timber, cut and growing upon its lands described in its complaint, and that is by the construction of a temporary logging railroad over the right of way that it seeks to condemn over the lands of the appellant company. These lands are located in a mountainous section of this State, covered with growing timber of great value, which must either be transported to the mills of the respondent company, or other mills, to be manufactured into lumber, or left to lie upon the ground and decay or be subject to destruction by fires. The lands were not, prior to the construction of the temporary logging railroad by the respondent company, devoted to a public use or any use. Upon the lands of these companies, which may be reached by this railroad and an extension thereof, there are about 10,000,000 feet of growing timber, matured and ready to be manufactured. All of this timber can be transported to mills and manufactured into lumber over the railroad constructed upon this right of way, by reason of its location, which by agreement might be utilized by both companies without in any way seriously discommoding the appellant company. To deprive the respondent company of the right of condemnation would mean in effect the destruction of the timber growing upon the lands. To sustain

the judgment of the trial court means the development of one of the material resources of the State and making possible the transportation and manufacture into lumber of between 3,500,000 and 5,000,000 feet of valuable timber. The march of progress in the development of the material resources of this State would almost seem to justify the temporary use, upon just compensation being paid, of the lands of the appellant company, despite the owner's protest, in view of the great benefits, both direct and incidental, that will follow by reason of the construction of the temporary railroad, and we are of the opinion that under the facts of this case and under the provision of the constitution of this State heretofore referred to, the power of eminent domain may be rightfully exercised."

(33102)

Alexander & Britton

Counsel for D. E.



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Constitution of Washington, Sec. 16, Art. 1 . . 2.
Laws New Hampshire, 1860, General Mill Act, Ch. 20, Sec. 1 . . . . . 20.
1 Remington & Ballinger, 127 . . . . . 29.
2 Remington & Ballinger, 7106 . . . . . 30.
Rev. Stat. Utah, 1898, Sec. 3588, ... 75,77.
Session Laws, 1899, Ch. 130, 255 . . . . . 28.
Session Laws, 1905, Ch. 65, 124 . . . . . 29.
Session Laws, 1905, Ch. 82, 161 . . . . . 30.
Session Laws, 1907, 349 . . . . . 29,53.
Session Laws, 1913, Ch. 133, 412 . . . . 2, 15, 25.

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Black's Constitutional Law, 2nd Ed, Sec. 175 . . . . . 31 34.

Boecler . . . . . .92.

Broom's Legal Maxims, 3-4 . . . . . 31,32.

Brotius, Rights of War and Peace, 20 (Universal Classics Ed) . . . . . .31,32.

Burlemaque, Principles of Law 92

Cooley, Constitutional Limitations, 763 et seq. . . . . 33, 65, 66, 88.

De Vattel, Law of Nations, 112 . . . . . 31,32.

Domat, Civ. L., Book 1, Title 2, Sec. 13,. . 31,32

15 Cyc., 579 . . . . . 31, 65, 66.

Elliott, Roads and Streets, 3rd Ed., 215 . . 65.

3 Kent's Com., 270 . . . . . .39.

2 Kent' Com., 5th Ed., 340 . . . . . 31,36.

Lewis, Eminent Domain, Sec. 250, 520, ... 31,36, 65, 67, 88, 92.

McGehee, Due Process of Law, 255 . . . . . 31. 36 65, 67.

Pomeroy, Municipal Law, 2nd Ed., Sec. 674 31.

10 R. C. L., Eminent Domain, Sec. 36 . . 65,67.

Tiedman, State and Federal Control, Sec 141 . . . . . 31,36, 65, 66

Walker's American Law, 7th Ed., Sec. 81, 215 . . . . . 31.

Wharton, Commentaries on American Law note 571 . . . . . 31.

Weeks, Damnum Absque Injuria, Sec. 14, 19 . . . . . 31,36.

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State ex rel Davis vs. Superior Court, 82 Wash., 32 . . . . . 2.
State ex rel C. M. & P. S. vs. Pub. Ser. Com. 77 Wash., 546 . . . . . 30,48.
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State ex rel Lyle vs. Superior Court, 70 Wash., 491 . . . . . 52.
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IN

The Supreme Court of the United States

October Term, 1915.

No. 471.

THE STATE OF WASHINGTON ex rel, GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Plaintiffs in Error,

vs.

THE SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY and COATS-FORDNEY LOGGING COMPANY, Defendants in Error.

In Error to the Supreme Court of the State of Washington.

OPENING BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF THE CASE.

The question raised for decision is whether, under the 14th amendment to the federal con-

stitution, the land of the Grays Harbor Logging Company, and W. E. Boeing, can be taken without their consent, for the strictly private use of the Coats-Fordney Logging Company. In the trial court, and in the state supreme court, we contended at every stage of the proceeding that such taking was in violation of the 14th amendment. The case was prosecuted to the highest state court in which a decision could be had and the decree of necessity is, under the state practice, final.

Seattle vs. Land, 81 Wash. 209.

State ex rel Davis vs. Superior Court, 82 Wash. 32.

Chi. M. & P. Ry vs. Slosser 82 Wash. 467.

Also see cases cited in our answer brief on motion to dismiss or affirm.

The taking of our private property for avowedly private use was justified by the state courts under a state statute enacted in 1913, Session Laws 1913, Ch. 133, 212, and by the constitution of the State of Washington, Art. 1, Sec. 16. The statute and the section of the state constitution are printed in the appendix to this brief. It is the contention of the plaintiffs in

error that the 14th amendment does not permit the taking of a private way of necessity; and that the taking in this case is not based on the condition of necessity, which, in a few rare instances, state courts have held to justify the taking of private property for private use.

The Coats-Fordney Logging Company is the owner of four distinct, separate and non-contiguous tracts of land, described as section thirty, section twenty, the southwest quarter of section eight, and the southwest quarter of section ten. (Transcript of record 4.) These lands are timbered.

The private purpose of the Coats-Fordney Logging Company is to build a private railroad from the south to remove the timber from these lands. There is a navigable river extending through the township and through the southwest quarter of section eight. The river is distant from the west line of section thirty about two hundred feet, and distant from section twenty about one-half mile. The proposed railroad would be a number of miles in length.

In paragraph four of the petition to condemn (Transcript of record 2) it is alleged that a private way of necessity is sought for the purpose

of constructing and maintaining thereon a private railroad, and for the purpose of taking over said right of way, and by means of said logging railroad, timber products to be taken from the lands of said petitioner herein above described.

A demurrer was filed to the petition to condemn by each of the plaintiffs in error upon the following grounds:

> "1. Because said petition fails to state facts sufficient to constitute a cause of action, or cause for condemnation of defendant's said lands.
>
> 2. Because the petitioner is without legal capacity to maintain the action.
>
> 3. Because this proceeding and the statute under which this proceeding is waged, to-wit: Chapter 133 of the Session Laws of 1913, of the State of Washington, are contrary to, and in violation of the constitution of the State of Washington, and of the United States."
>
> (Transcript of record 4-5.)

Each of these demurrers were overruled and exceptions allowed. (Transcript of record 6.)

Thereupon each plaintiff in error made answer and set up as a defense:

> "That by this proceeding the petitioner seeks to take the said property of this defendant without due process of law and in

violation of the constitution of the United States, and the constitution of the State of Washington. That said attempted taking of the private property of this defendant is for the private use of the petitioner, and not for any public use, and no necessity exists therefor." (Transcript of record 7.)

FINDING OF FACT.

After trial, the Superior Court of Washington for Chehalis County, made findings as follows: (Transcript of record 9 to 12)

That the Coats-Fordney Logging Com- to 12.) That the Coats-Fordney Logging Company is a corporation organized under the laws of the state of Washington, and authorized and engaged in the logging business. (Transcript of record, 9-10.) The articles of incorporation of the Coats-Fordney Logging Company are found on pages 156, et seq of the Transcript of record.

Finding of fact number four, was to the effect that the Coats-Fordney Logging Company was engaged in the removal of timber by means of a private logging road bringing the timber to

tidewater in the Wishkah River, and that it desired to extend its line through a part of the northwest quarter of section thirty-two (lands of plaintiffs in error.) (Transcript of record 10-11.)

Finding of fact number five is as follows:

> "That is is necessary for the proper use and enjoyment of the petitioner's said lands and for the removal of timber thereon by petitioner, to have and maintain a private way of necessity over and across the said northwest quarter of said section thirty-two, said private way of necessity to consist of a right of way over and across said last named quarter section of land, for the purpose of constructing and maintaining thereon a private logging railroad in order to take over said right of way and said railroad, the timber products of the lands so owned by the said petitioner; that the petitioner has no other available or reasonably practical route over or through which to reach the said timber lands with its said logging road, except the route sought to be acquired herein, a particular description of which is hereinafter set out; that in order to remove the said timber by means of its said logging railroad or otherwise, it is necessary that the said petitioner cross over and upon lands which it does not own and over which it has no control and through which it has no rights of way for logging purposes." (Transcript of record 11.)

DECREE OF NECESSITY AND PRIVATE USE.

The trial court made the following findings which tended to show that there was no necessity for the logging railroad crossing our lands and also showing the presence of another public highway: to-wit, a navigable river.

2.

"That the petitioner owns section 30, in said township 19 north range west. That said section contains about 16,000,000 feet of merchantable timber. That the east fork of the Wishkah river is distant from the west line of said lands about 200 feet.

Found. Exception allowed petitioner.

MASON IRWIN, Judge.

3.

That section 20 in said township 19 north range 8 west, contains 20,000,000 feet of

merchantable timber; that said land is distant from the east fork of the Wishkah river at the nearest point, about one-half mile.

Found. Exception allowed petitioner.

MASON IRWIN, Judge.

4.

That the southwest quarter of section 8 in said township is owned by petitioner; that the east fork of the Wishkah river touches one corner of said lands and the same can be logged into said river; that no necessity exists for condemning the right of way for the removal of the timber from said southwest quarter of section 8, if it is considered as a tract separate from the other lands of petitioner. That there is about 4,500,000 feet of merchantable timber upon said land.

Found. Exception allowed petitioner.

MASON IRWIN, Judge."

The judgment of necessity is:

"It is therefore ordered and adjudged that the said petitioner is entitled to condemn and appropriate the aforesaid right of way for the purpose of constructing thereupon its said private logging railroad, together with all proper or necessary spurs, switches, sidings or other improvements, proper or necessary in the ordinary construction, maintenance and operation of its said railroad, and to maintain, equip, and operate such railroad only for the following purposes, to-wit: For the removal of any and all timber products located and being upon section 30, section 20, the SW¼ of section 10, and the SW¼ of section 8, all in township 19 north of range 8 west of the

Willamette Meridian, in Chehalis County, Washington.

And it is further ordered and adjudged that the said cause be set down for trial for the assessment of damages for the taking, damaging, or injuriously affecting the said property and to ascertain, determine and assess the damages and compensation to be made in money by the said petitioner, irrespective of any benefits from any improvement proposed by the said petitioner, to respondents, for the taking, damaging, or injuriously affecting the said land, premises and property.' (Transcript of record 12.)

EXCEPTIONS.

The plaintiffs in error, each made the following exceptions, each of which were severally allowed by the court:

1.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 1, contained in the order and decree of condemnation, and to each and every specific fact found therein.

2.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 4, contained in the order and decree of condemna-

tion, and to each and every specific fact found therein.

3.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 5, contained in the order and decree of condemnation, and to each and every specific fact found therein.

4.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 6, contained in the order and decree of condemnation, and to each and every specific fact found therein.

5.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 7, contained in the order and decree of condemnation, and to each and every specific fact found therein.

6.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally except to the finding of fact numbered 8, contained in the order and decree of condemnation, and to each and every specific fact found therein.

7.

The respondents, Grays Harbor Logging Company and W. E. Boeing, severally ex-

cept to the finding of fact numbered 9, contained in the order and decree of condemnation, and to each and every specific fact found therein.

8.

The respondents severally except to the finding of fact numbered 10, and to the order and decree therein.

ASSIGNMENT OF ERROR IN STATE STATE SUPREME COURT.

In the Supreme Court of Washington, the following assignments of error were urged:

> "As to each tract of timber lands owned by the Coats-Fordney Logging Company, it was error to hold that any necessity existed which justified the condemnation of our private property.
>
> That it was error to exclude testimony showing a feasible route across the northeast quarter of section thirty-one. which would have avoided our lands.
>
> That the statute, under which the court has condemned our lands is unconstitutional, and in violation of the due process of law clause in the federal constitution."
>
> (Transcript of record 122.)

ASSIGNMENTS OF ERROR.

1. The taking of our land for a right of way for the private use of the Coats-Fordney Logging Company, a private corporation, is contrary to the 14th amendment to the federal constitution.

2. That as to each tract of timber land owned by the Coats-Fordney Logging Company, it was error to hold that any necessity existed which justified the taking of our private property for the private use of said corporation.

3. That the state statute, (Session Laws of Washington, 1913, Ch. 133, 412), is in con-

flict with the 14th amendment to the federal constitution and is not due process of law.

4. That if the constitution of the state of Washington, Article 1, section 16, is construed so as to justify the taking of our private property for the private use of the Coats-Fordney Logging Company, the state constitution is to that extent in conflict with the 14th amendment to the federal constitution and in violation of the due process of law clause thereof.

STATE PRACTICE.

According to the state practice, an appeal does not lie from the judgment of condemnation, not because the judgment is not final, but because the general appeal statute is not applicable to eminent domain proceedings.

West American Co. vs. St. Ann Co. 22 Wash., 158.

Chi. M. & P. Ry vs. Slosser, 82 Wash. 467.

THE QUESTION IN STATE SUPREME COURT.

The Supreme Court of Washington sustained the taking in this case as not in violation of the 14th amendment to the federal constitution, and sustained the constitutionality of the private way of necessity statute on which the proceeding is based, and held that in the case of State ex rel Mountain Timber Company vs. Superior Court, 77 Wash. 585, the constitutional question had been determined it declined to again consider it.

State ex rel Grays Harbor Logging Co. vs. Superior Court, 82 Wash. 503.

Really the only question in this case is whether, under the 14th amendment to the federal constitution, the private property of the plaintiffs in error can, without their consent, be taken for the admittedly private use of the Coats-Fordney Logging Company.

In one case other than the case at bar, the supreme court of Washington has sustained the statute in question, as not in conflict with the due process of law clause contained in the 14th amendment to the federal constitution. In the first case, this important question was summarily disposed of by the state supreme court, saying in State ex rel Mountain Timber Company vs. Superior Court, 77 Wash. 585:

"The taking of private property for private use for the promotion of the general welfare, upon due notice and hearing and the payment of compensation, is not incompatible with due process of law, as guaranteed by the Federal constitution. Head vs. Amoskeag Mfg. Co., 113 U. S., 9.

Head vs. Amoskeag Mfg. Co., 113 U. S. 9, does not support the citation. That was a condemnation proceeding to condemn the right to maintain a mill dam under a state statute which

provided a hearing and adjudication upon the question of public use.

The difference between the statute in case at bar and the statute in the Head-Amoskeag case is extreme. Here the private way is for the use of the private owner of land; there a dam could be erected " for use of mills below."

Thus it appears that the supreme court in upholding the constitutionality of the Act in case at bar, labored under the misapprehension as to what was decided by this court in Head vs. Amoskeag Mfg. Co. From the finding of the committee an appeal laid. Section 1, of the statute, General Mill Act, New Hampshire of 1868, chapter 20, provided:

> "Any person or any corporation, authorized by its charter so to do, may erect and maintain on his or its own land or upon the land of another with his consent, a water dam to raise the water for working it or for creating a reservoir of water and for equalizing the flow of the same, for its use and of mills below, upon and across any stream not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed.
>
> Supra.

Section 2 of the Act provides for a legal proceeding to determine damages and the appointment of a committee.

Section 3 of the Act provides.

"The committee shall give such notice to the parties as shall be ordered by said court; shall hear the parties and view the premises; and if they shall be of opinion that the flowing or draining of land, to the depth and extent that the same may or can be flowed by said dam is or may be of public use or benefit to the people of this state and that the same is necessary for the use of the mill or mills for which said dam was designed, they shall estimate the damages and make report to the court, at the next term thereof after said view and estimate. Upon the return of the report of said committee, any person interested therein may object to the acceptance of the same for any irregularity or improper conduct of said committee; and said court may set aside said report for any just and reasonable cause and, if required, shall inquire for itself whether the erection of said dam is of public use or benefit, any findings of the committee upon that point notwithstanding; and if the court shall be of opinion that the erection of said dam is not of public use or benefit, the petition shall be dismissed. But if the report shall be accepted and established, the court shall render judgment thereon, after adding fifty per cent to the estimate of damage: which judgment shall be final, and execution shall issue thereon."

The only other case in which the question has been before the state supreme court is the

case at bar, and the court in its opinion, 82 Wash., 503, said:

> "III. The relators' brief shows an exhaustive and painstaking investigation into the question as to whether the state statute giving the right to condemn for a private way of necessity offends against the due process of law clause in the 14th amendment to the federal constitution. Were the question an open one in this state, it would present an interesting problem. In State ex rel. Mountain Timber Co. v. Superior Court, supra, it was expressly held that the statute giving the right to condemn a private way of necessity was not incompatible with due process of law as guaranteed by the Federal constitution. That case was heard en banc, and the opinion was concurred in by all members of the court. The question is at rest so far as this court may be concerned."

That the statute in question, unlike that of Head vs. Amoskeag, is purely private in scope, does not admit of doubt.

SCOPE OF STATE CONSTITUTION.

To justify taking our property, it has been assumed that a private logging railroad is a private way of necessity. The lower courts so construed the state constitution. On the contrary, our position is that a private way of necessity, within the meaning of section 16, article 1, of the state constitution, means a private way for agricultural, domestic or sanitary purposes and is not to be extended to include any and all private enterprises. The applicable part of the state constitution reads:

> "Private property shall not be taken for private use, except for private ways of ne-

cessity, and for drains, flumes, or ditches, on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, - - -"

In State ex rel. Tacoma Industrial Co. vs. White River Power Co., 39 Wash., 648, the supreme court of Washington held that the State constitution conflicted with the due process of law clause of the federal constitution, insofar as it may be construed to extend the right of eminent domain to take private property for uses essentially private. In that case, the use was to generate electricity to be sold commercially.

In Louisville-Nashville vs. Central Stock Yards Co. 212 U. S., 135, when the state supreme court of Kentucky had given its constitution a broad construction, this court did not hesitate to say that as so construed the state constitution could not stand under the 14th amendment.

So in this case, if the state constitution does authorize the taking of our private property for the private logging railroad of the Coats-Fordney Company, as a so-called way of necessity, it runs counter to the due process of law clause in the 14th amendment to the federal constitution.

PRIVATE WAY STATUTE OF 1913.

Neither in the title, nor in the body of the statute, under attack, is any allusion made to public use. There is no requirement that a finding of public use or public necessity be made. The Act defines a private way of necessity and that alone. It bears the title

> "AN ACT relating to the taking of private property for private ways of necessity and for drains, flumes, and ditches, on or across the lands of others for agricultural, domestic, or sanitary purposes."
>
> Session Laws, 1913, Ch. 133, 412.

The Act is printed in the appendix to this brief.

The finding of the trial court on the question of use and necessity contains no provision whatever concerning public use. The particular finding is:

> "That it is necessary for the proper use and enjoyment of the petitioner's said lands and for the removal of the timber thereupon by petitioner, to have and maintain a private way of necessity over and across the said NW¼ of said section thirty-two, said private way of necessity to consist of a right of way over and across said last named quarter section of land, for the purpose of constructing and maintaining thereon a PRIVATE logging railroad in order to take over said right of way and said railroad, the timber products of the lands so owned by the said petitioner; that the petitioner has no other available or reasonably practical route over or through which to reach the said timber lands with its said logging railroad, except the route sought to be acquired herein, a particular description of which is hereinafter set out; that in order to remove the said timber by means of its said logging railroad or otherwise, it is necessary that the said petitioner cross over and upon lands which it does not own and over which it has no control and through which it has no rights of way for logging purposes."
>
> Transcript of record, 11.

It will be noticed that the trial court made no finding that the interest of the community would be served; the public welfare advanced;

or the public accommodated by the taking of our property. The order to condemn is strictly and solely for the private way of necessity for a private logging road for the Coats-Fordney Logging Company to transport ITS TIMBER.

HISTORY OF STATE LEGISLATION.

Ten years after admission to statehood, and in 1899, a statute was enacted providing for the condemnation of logging road rights of way. Session Laws, 1899, Ch. 130, 255.

This statute was declared to be unconstitutional because a taking of private property for private use.

Healy Lumber Co. vs. Morris, 33 Wash. 490.

Later, in 1905, the state legislature provided for the submission of a proposed amendment to the state constitution declaring, among other things, that lumbering and removal of timber was a public use. The proposed amendment is

printed in the appendix to this brief.

Session Laws, 1905, Ch. 65, 124.

Said proposed amendment was defeated at the polls, whereupon the next legislature, in 1907 submitted a similar proposed amendment at the next election. This proposed amendment is printed in the appendix to this brief.

Session Laws, 1907, Ch. 69, 112.

The second proposed amendment met the same fate as the first. Said proposed amendments are of course omitted from the compilation of the state constitution and statutes.

1 Remington & Ballinger, 127.

Should the court desire it, we will obtain the certificate of the Secretary of State of the state of Washington, showing that each of said proposed amendments was defeated at the polls.

The public policy of the state, as expressed at two general state elections is that "rights of way * * for lumbering purposes, or for the removal of timber or timber products," is not a public use. The submission by two successive state legislatures of two identical amendments to the state constitution upon this question warrants the inference that the legislature understood that in its present form the state constitu-

tion did not permit the condemnation of a right of way to remove timber.

The welfare of the state is not advanced by the taking without the owner's consent of private property rights of way for logging roads. Only on the theory that a private logging road is better than a public logging road can such a theory be sustained. In 1905 a toll logging road was passed.

Session Laws 1905, Ch. 82, 161.
2 Remington & Ballinger, 7106.

The Supreme Court of the state of Washington has sustained this statute as constitutional because a toll logging road is a quasi public company, and a common carrier and serves the public in the transportation of timber and timber products.

State ex rel Clark vs. Superior Court, 62 Wash., 612.
State ex rel C. M. & P. S. vs. Pub. Ser. Com., 77 Wash., 546.
State ex rel Clear Lake vs. Superior Court, 83 Wash., 445.

The writers on legal theory all agree in defining the right of eminent domain as the power to take private property for public use. The right does not include the power to take private property for private use.

Grotius, Rights of War and Peace, 20 (Univ. Classics Ed.)
De Vattel, Law of Nations, 112.
Domat, Civ. L., Book 1, Title 2, Sec. 13.
Pomeroy's Municipal Law, 2nd Ed, Sec. 674
Wharton, Commentaries on American Law, note, 571.
Cooley , Constitutional Limitations, 763, et seq.
Walker's American Law, 7th Ed., Sec. 81, 215.
Black's Constitutional Law, 2nd Ed., Sec. 175.
Broom's Legal Maxims, 3-4.
Weeks, Damnum Absque Injuria, Sec. 14, 19.
2 Kent's Com., 5th Ed., 340.
Tiedman, State and Federal Control, Sec. 141.
Lewis, Eminent Domain, Sec. 260, 520.
McGehee, Due Process of Law, 255.

The right of eminent domain as it exists today, was stated in a way, but not fully developed, by Grotius and Vattel. Grotius, Rights of War and Peace, supra:

> "Right, strictly taken, is again two-fold, the one, Private, established for the advantage of each individual, the other, Superior, as involving the claims, which the state has upon individuals, and their property, for the public good. Thus the Regal authority is above that of a father and master, and the Sovereign has a greater right over the property of his subjects, where the public good is concerned, than the owners themselves have. And when the exigencies of the state require a supply, every man is more

obliged to contribute towards it, than to satisfy creditors."

Vattel, Law of Nations, supra:

"The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the eminent domain."

Even under the arbitrary government of the Roman emperors, it was not lawful, nor justifiable, for the sovereign to take the property of one citizen and give it to another where the public interest was not concerned in the transfer.

1 Domat Civ. L. Book 1, Title 2, Sec. 13.

Pomeroy, Municipal Law, supra:

"The right of eminent domain is that right which the government possesses to take the private property of an individual, and appropriate it to a public use. It is based upon that supreme authority which the state, the entire body politic, holds over all its members; it flows from the principle that the rights and conveniences of an individual must yield to the higher necessities or convenience of the whole."

Wharton, Commentaries on American Law, supra:

"It should be remembered that the right to hold property free from any interference on the part of the state, except through due process of law, is one of the rights pro-

nounced by the Declartion of Independence to be absolute and inalienable. The inference is, that any constitutional limitation limitation invading this right is to be construed strictly in favor of the people and against the government."

Cooley, Constitutional Limitation:

"The definition given of the right of eminent domain implies that the purpose for which it may be exercised must not be a mere private purpore; and it is conceded on all hands that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit. The right of eminent domain, it has been said, "does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer." It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by exercise of this right. The easement in such case would be the property of him for whom it was established and although the owner would not be deprived of the fee in the land, the beneficial use and exclusive enjoyment of his property would in greater or less degree be interfered with. Nor would it be material to inquire what quantum of interest would pass from him; it would be sufficient that some interest, the appropriation of which detracted from his right and authority, and interfered with his

exclusive possession as owner, had been taken against his will; and if taken for a purely private purpose, it would be unlawful. Nor would it be of importance that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises; the public use implies a possession, occupation, and enjoyment of land by the public at large, or by public agencies, and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it."

Walker, American Law:

"First, the private right of an individual must yield to the eminent domain government, whenever the public good requires it. And this is well, for otherwise it would be in the power of one obstinate owner to prevent the execution of any of those great public improvements which contribute so much to the general convenience and happiness. Secondly, to equalize the burden, and avoid all hardship, the owner of property so taken is to receive a compensation, which shall be full, just and in money. Any law, therefore, which should condemn private property for any other than a public use, or which should not provide for such a compensation, would be unconstitutional."

Black, Constitutional Law:

'The purpose for which the power of

eminent domain is to be exercised must be public, and not merely for the benefit of a private person."

"The power of eminent domain, like that of taxation, cannot be exercised by the state for the benefit of one or more particular individuals. There is no power in any state government to take property of one man and give it to another, or to compel one man to sell his property to another, or to authorize one person to appropriate the property of another, or to authorize one person to appropriate the property of another, even though compensation be made."

Broom, Legal Maxims:

"The great end," it has been observed, "for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole." * * * "In the familiar instance, likewise, of an Act of Parliament for promoting some specific object or undertaking of public utility, as a turnpike, navigation, canal, railway, or paving Act, the legislature will not scruple to interfere with private property, and will even compel the owner of land to alienate his possessions on receiving a reasonable price and compensation for so doing; but such an arbitrary exercise of power, is indulged with caution; the true principle applicable to all such cases being, that the private interest of the individual is never to be sacrificed to a greater extent than is necessary to secure a public object of adequate importance."

Weeks, Damnum Absque Injuria, supra:

"And for public utility, the legislature may interfere with private property, and compel the owner of land to alienate his possessions, on receiving a reasonable price and compensation; but the owner is not to be exercised to a greater extent than is absolutely necessary for the public welfare."

Kent, Com. supra:

"I apprehend that the decision of the court was founded on just principles, and that taking private property for private uses, without the consent of the owner, is an abuse of the right of eminent domain, and contrary to fundamental and constitutional doctrine in the English and American Law.'

Tiedman, State and Federal Control, supra:

"The authorities are unanimous in the recognition of the abstract proposition, that the legislature cannot in the exercise of the right of eminent domain, even when the compensation is made on the most liberal terms, take the land from a private owner and appropriate it to any but a public use."

Lewis, Eminent Domain, supra:

"It has never, we think, been decided in any case that private property could be condemned for a private road for the exclusive use of the applicant, and we know of no principle upon which such a proceeding can be justified."

McGehee, Due Process of Law, supra:

"To take property for other than a pub-

lic purpose: to take, for instance, the property of one citizen and transfer it to another, would be a deprivation thereof without due process of law; and such a proceeding is equally unconstitutional when the appropriation is accompanied by full compensation, as when it is legislative confiscation without compensation."

DECISIONS BY THIS COURT.

This court has often held, or recognized, that private property cannot constitutionally be taken for avowedly private uses, whether the right to do so is claimed as a right to tax, or under the eminent domain power.

West River vs. Dix, 6 How., 545.
Wilkinson vs. Leland, 2 Pet., 657.
Citizens Savings Bank vs. Topeka, 87 U. S., 655.
Cole vs. LaGrange, 113 U. S., 1.
Kaukauna vs. Green Bay, 142 U. S., 254.
Fallbrook vs. Bradley, 164 U. S., 111.
Mo. Pac. Ry. Co. vs. Nebraska, 164 U. S., 403.
Chicago, B. & C. vs. Chicago, 166 U. S., 224.

Cass vs. Detroit, 181 U. S., 395.
Union Lime Co. vs. Chicago, 233 U. S., 211.
German Alliance Co. vs. Lewis, 233 U. S., 387.

West River Bridge Co. vs. Dix, 6 How, 551, this court said:

> "Nor does even the path for the road, the easement itself, if the use be not public, but merely for particular individuals, and merely in some degree beneficial to the public. On the contrary, the user must be for the people at large—for travelers, for all; must also be compulsory by them, and not optional with the owners; must be a right by the people, not a favor; must be under public regulations as to tolls, or owned or subject to be owned, by the state, in order to make the corporation and object public, for a purpose like this. (3 Kent's Com., 270; Railroad Company vs. Chappell, 1 Rice 383; Memphis vs. Overton, 3 Yerger, 53; King vs. Russell, 6 Barn & Cress, 566; King vs. Ward, 4 Adol & Ellis 384) * * * "It may be, and truly is, that individuals and the public are often extensively benefitted by private roads, as they are by mills, and manufactories, and private bridges. But such a benefit is not technically nor substantially a public use, unless the public has rights. (1 Rice, 388.)"

Cass vs. Detroit, supra, states:

> "We have recently held that it was not the intention of the 14th amendment to subvetr the systems of the states pertaining to general and special taxation; that that amendment legitimately operates to extend

to the citizens and residents of the states the same protection against arbitrary state legislation by Congress, and that the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state applicable to all persons in like circumstances and conditions, but only when there is some abuse of law amounting to confiscation of property, or deprivation of personal rights."

Savings & Loan vs. Topeka, supra:

"To lay with one hand, the power of the government on the property of the citizens, and with the other bestow upon favored individuals to aid private enterprises, and build up private fortunes, is none the less robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

Cole vs. La Grange, supra:

"The general grant of legislative power in the Constitution of a State does not enable the Legislature in the exercise of either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but public object. * * * It is true that this article regards the right of eminent domain and not the power to tax, for the taking of property by taxation requires no other compensation than the taxpayer receives in being protetcd by the government to the support of which he contributes. But, so far as respects the use, the taking of private property by taxation is subject to the same limit

as the taking by the right of eminent domain. Each is a taking by the State for the public use, and not to promote private ends."

Kaukauna vs. Green Bay, supra:

An injunction was sued out to enjoin interference with certain river improvements. The defendant in error argued that on account of the Act of the legislature of 1840, the company was not affected by the 14th amendment adopted in 1868, the Act of the legislature reserved to the state certain water power and as construed by the Supreme Court operated to deprive the plaintiff in error of its property. The court held it was beyond the competency of the state to appropriate property of an individual for the sole purpose of creating water power to be leased for manufacturing purposes.

In Fallbrook Irrigation vs. Bradley, supra, the court said the use for which private property is taken must be a public one, whether the taking is by the exercise of eminent domain or by taxation, and quoted the La Grange case.

In Missouri Pacific Railway Co. vs. State of Nebraska, supra, the court considered the constitutionality of a state statute under which the State Board of Transportation required a rail-

road company to surrender a part of its land to private persons for the purpose of building and maintaining a grain elevator. This was held to be a taking of private property of the company for the private use of such persons. The court adopted the construction given to the statute by the highest court of the state and said:

> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States."

In Chi. B. & Q. R. Co. vs. Chi., supra, the court quoted from the Davidson case, above cited, and the court said if the compensation for private property taken for public use is an essential element in due process of law, as ordained by the 14th amendment, then the fair judgment of the state court, under the authority of which property is in fact taken, is to be deemed the act of state, within the meaning of that amendment.

In the dissenting opinion, by Justice Lamar, German Alliance Ins. Co. vs. Lewis, 233 U. S., 425, in which case insurance business was held

to be affected with a public interest so as to permit legislative regulation, Justice Lamar argued:

> "For great and pervasive as is the power to regulate, it cannot override the constitutional principle that private property cannot be taken for private uses. Mo. P. R. Co. vs. Neb., 164 U. S., 403; 41 L. Ed., 489; 17 Sup. Ct. Rep., 130. That limitation on the power of government over the individual and his property, cannot be avoided by calling an unlawful taking a reasonable regulation. Indeed, the protection of property is an incident of the more fundamental and important right of liberty guaranteed by the constitution * * *."

LOWER FEDERAL COURT DECISIONS.

The following cases by lower federal courts, hold that private property cannot be constitutionally taken for private use:

Shasta Power Co. vs. Walker, 149 Fed. 568.
Dodge vs. Mission, 107 Fed., 827.
Harp vs. Choctaw, 118 Fed., 169.
U. S. vs. O-W. R. N., 159 Fed., 980.
Larrabee vs. Dolley, 175 Fed., 391.

Upon the authority of the Missouri Pacific-Nebraska case, 164 U. S., 403, in Harp vs. Choctaw, 118 Fed., 169, it was held that a railroad company was under no legal obligation to construct a spur track from its line to a coal mine for the private benefit of the owner to ship his

product. This was held to be:

> "* * * pro tanto as much an appropriation of private property for private use, and therefore a taking of private property without due process of law, as it would have been, in the above entitled cases, to have compelled the defendants to allow plaintiffs to construct elevators on the rights of way of said defendants, to be used by said plaintiffs for private, and not for public purposes; for it must be remembered that the plaintiff in this case was not engaged in any public business, but was simply a private citizen, operating a coal mine on his own account."

Upon the authority of the same case, in United States vs. O-W. R. N. Co., 159 Fed., 980, it was held that a railroad company could not be compelled to establish a station for the special accommodation of a public customer. The reasoning of the court, at page 980, shows it was considered to be taking of private property for a private use.

In citing the Missouri Pacific-Nebraska case, (164 U. S., 403) in Larrabee vs. Dolley, 175 Fed., 391, the cases are collected holding that:

> "* * * the state may not, through the exercise of the power of taxation, or by the exercise of any other governmental power take private property for purely private purposes, is also conclusively established."

In the case bearing the same name, Missouri Pacific vs. Nebraska, 217 U. S., 194, the former case of that name is cited approvingly, and holds that a statute under which a railroad company can be compelled to build a side track or switch to reach a grain elevator off its right of way, is a taking of the private property of the railroad company without due process of law.

WASHINGTON SUPREME COURT DECISIONS.

Omitting for the time being, the two decisions sustaining the statute assailed in this cause (State ex rel Mt. Timber Co. vs. Superior court, 77 Wash., 585; State ex rel Grays Harbor Logging Co. vs. Superior Court, 82 Wash., 503, the case at bar) the Supreme Court of the state of Washington, has repeatedly and uniformly held that private property cannot be taken under the eminent domain power for private uses. These cases are:

Healy Lumber Co. vs. Morris, 33 Wash., 490
Matthews vs. Belfast, 35 Wash., 666.

State ex rel Tacoma vs. White River, 39 Wash. 648.
State ex rel Harlan vs. Centralia, 42 Wash., 632.
State ex rel Tolt vs. Superior Court, 50 Wash., 13.
State ex rel Shropshire vs. Superior Court,
State ex rel Dominick vs. Superior Court, 52 Wash., 196.
Tacoma vs. Nisqually, 57 Wash., 360.
Northern Pacific vs. Railroad Commission, 58 Wash., 360.
Sultan vs. Great Northern 58 Wash., 612.
State ex rel Clark vs. Superior Court, 62 Wash., 612.
Neitzel vs. Spokane, 65 Wash., 100.
State ex rel Wauconda vs. Superior Court, 70 Wash., 491.
State ex rel Weyerhaeuser vs. Superior Court, 71 Wash., 84.
State ex rel C. M. & St. P. vs. Public Service, 77 Wash., 538.
State ex rel Clear Lake vs. Superior Court 83 Wash., 445.
State ex rel Public Service vs. Spokane, 89 Wash.,, 599.

WASHINGTON CASES.

In Healy Lumber Co. vs. Morris, supra, a prior statute, like the statute under consideration, in that it authorized the owner of timber lands to condemn a right of way for a logging road for lumbering purposes, was held to be unconstitutional because it involved the taking of private property for private use. The reasoning of the court is particularly applicable in condemnation of the present statute.

> "It cannot be within the meaning of the constitution, the distinction between public policy and public use is to be obliterated. It

might be of unquestionable public policy, and for the best interests of the state, to allow condemnation of lands in every instance where it would result in aiding prosperous business enterprises which would give employment of labor stimulate trade, increase property values, and thereby increase the revenues of the state, even if the enterprise was purely private; for such is the relation, under our form of government, between public and private prosperity that one cannot be enjoyed to any appreciable extent without favorably influencing the other. But it is evident that this was not the kind of public use that was within the minds of the framers of the constitution; and it seems to us that the logic of those courts which have sustained appellant's contention is justified solely on grounds of public policy.

It seems scarcely necessary to particularize to show to what extent this doctrine might practically be carried. Under such liberal construction, the brewer could successfully demand condemnation of his neighbor's land for the purpose of the erection of a brewery, because, forsooth, many citizens of the state are profitably engaged in the cultivation of hops * * *."

33 Wash., 490.

In Sultan vs. Great Northern, 58 Wash., 612, the court discussed the Healy case and said:

"It is true that we did there hold that a logging company, performing no public function was without power to condemn a way for a road, notwithstanding the legislature had purported to confer upon it that power."

In State ex rel Tacoma Industrial Co. vs.

White River Power Co., 39 Wash., 648, it was held that Article 21, of the state constitution, declaring the use of water for manufacturing purposes a public use, was in conflict with the due process clause of the federal constitution, insofar as it may be construed to extend the right of eminent domain to take private property for uses essentially private. There it was held that the right of eminent domain could not be exercised in favor of an electric light company to generate electricity to be sold commercially. The court quoted In re Tuttle, 49 L. R. A. 781 (N. Y.), which holds that a taking of private property for necessary drainage for private use violates the 14th amendment prohibiting any state depriving any person of property without due process of law.

In Tacoma vs. Nisqually Power Company 57 Wash., 420, it was held that the City of Tacoma could not condemn for uses partly public and partly private. The court said:

> "We have no desire at this time to enter upon any discussion of what is public use, or the effect upon proceedings of this character where there is an attempt to commingle public and private uses. Such questions have been before this court in a number of cases, and it has been uniformly held that condem-

nation could not be had where the manifest purpose was partly private. Healy Lbr. Co. vs. Morris, 33 Wash., 490, 74 Pac. 681, 99 Am. St. n964, 63 L. R. A. 820; State ex rel Tacoma Industrial Co. vs. White River Power Co., 39 Wash 648, 82 Pac. 150, 2 L. R. A. (ns) 842; State ex rel Harlan vs. Centralia-Chehalis Elec. R. & P. Co. 42 Wash. 632 85 Pac. 344, 7 L. R. A. (ns) 198; State ex rel Harris vs. Superior Court, 42 Wash. 660, 85 Pac. 665, 5 L. R. A. (ns) 672); State ex rel Domincik vs. Superior Court 52 Wash. 196, 100 Pac. 317, 21 L. R. A. (ns) 448."

In State ex rel Dominick vs. Superior Court, 52 Wash., 196, it was again recognized that the right of eminent domain could not be exercised to condemn for private use.

In State ex rel Lyle vs. Superior Court, 70 Wash, 491, the court again recognized that there was no power to condemn private property for private use, and said:

"It is the duty of the courts to see that private property is not taken for private uses, and that no excessive or unreasonable appropriation is made for public uses. Public service corporations seeking to exercise the right of eminent domain must proceed in good faith, as they will not be permitted to condemn private property for private uses. Yet property sufficient to meet prospective public needs can and may be taken."

In State ex rel Tolt Power Co. vs. Superior Court, 50 Wash., 13, it was held that a corpora-

tion engaged in a business essentially private could not by an offer to serve the public and submit to legislative control, convert itself into a public service corporation, so as to acquire the right of eminent domain conferred on public service corporations by Laws 1907, 349.

In Neitzel vs. Spokane, 65 Wash. 112, quoting from the Healy case, the court said that the public use must either be a use by the public or by some agency which is quasi public.

> "* * and not simply a use which may indirectly promote the general public interest or prosperity of the state."

There it was held that a wholesale grocery business conducted by a private corporation on land leased from a railroad company, is not a public use. It was also held that the statute conferring the right of eminent domain is to be strictly construed.

In State ex rel Wauconda vs. Superior Court, 68 Wash., 660, it was held that eminent domain statutes should be strictly construed, and in that action King County, (in which Seattle is located) was held not to have the right to condemn a site for a public dock or wharf. The cases holding that statutes conferring the power

of eminent domain, being in derogation of the common right, must be strictly construed are found in State ex rel Postal Tel. vs. Superior Court, 64 Wash., 189.

In State ex rel Clear Lake vs. Superior Court 83 Wash. 445, it was held a logging railroad is entitled to the exercise of the right of eminent domain to condemn lands for a right of way on a showing of a large supply of timber tributary to the road, since the bringing of this timber to mill or market would constitute a public use regardless of the extent of the use.

But there the railroad received without discrimination the timber products offered to it, and was a public service corporation.

In State ex rel Weyerhaueser vs. Superior Court, 71 Wash. 90, the court again recognized that where articles of incorporation empower the company to manufacture and supply electricity for all purposes, public and private, these uses are separable, and in such case, condemnation may be had for the public use only.

The latest expression of the Supreme Court of Washington, (February 15, 1916) is in State ex rel Public Service Commission vs. Spokane 89 Wash. 599. That decision was after the case

at bar reached this court, and speaking of public use, the court said:

> "We find no departure from our first holding that a sale of electrical energy or power for private purposes is not an engaging in a public service and gives such companies no right to assert the sovereignty of the state, Healy Lumber Co. vs Morris, 33 Wash., 490, etc."

From the foregoing it would seem to be definitely settled that the taking of private property for private use violates the state, as well as the federal constitution. Such decisions showing that the state policy has been not to expand the definition of "public use" so as to include "public welfare," "public benefit," or even "public policy."

DECISIONS OF OTHER STATES.

Many state decisions show that the principle is firmly settled that private property can be taken for only public use.

Alabama:
Toone vs. Alabama, 42 L. R. A., ns 1045.
Sadler vs. Langhan, 34 Ala., 311.
California:
Gillian vs. Hutchinson, 16 Cal. 154.
Lorenz vs. Jacob, 63 Cal., 73.
Sherman vs. Buick, 32 Cal. 242.
Nickey vs. Stearns, 126 Cal. 150.
Idaho:
Latah County vs. Peterson, 16 L. R. A., 81.
Indiana:
Great Western vs. Hawkins, 66 N. E. 765.

Wild vs. Dieg, 13 Am. Rep., 399.

Iowa:

Fleming vs. Hull, 35 N. W., 673.

Bankhead vs. Brown, 25 Ia., 540.

Illinois:

Gaylord vs. Sanitary District, 63 L. R. A., 582.

Nesbitt vs. Trumbo, 89 Am. Dec., 290.

Chi. E. I Ry. vs. Wiltse, 6 N. E., 49.

Kansas:

Howard vs. Schwartz, 95 Pac., 559.

Clarke vs. Commissioners, 66 L. R. A., 965.

Louisiana:

Bradley vs. Pharr, 19 L. R. A., 647.

Maine:

Brown vs. Gerald, 61 Atl., 785.

Maryland:

Arnsperger vs. Crawford, 70 L. R. A., 497.

Massachusetts:

Locks vs. Nashua, 104 Mass., 1.

Salisbury vs. Commonwealth, 46 L. R. A., ns, 1196.

Woodward vs. Central Vermont, 62 N. E., 1051.

Missouri:

Dickey vs. Tennison, 27 Mo., 373.

Kansas vs. North Western, 51 L. R. A., 936.

Minnesota:

State ex rel Schubert vs. Board, 114 N. W., 244.

Minn. Canal vs. Koochiching, 5 L. R. A., ns, 638.

Stewart vs. G. N., 33 L. R. A., 427.

Michigan:

Board vs. Van Hoesen, 49 N. W., 895.

Berrien vs Berrien, 94 N. W., 379.

Nebraska:

Welton vs. Dickson, 57 N. W., 559.

New Jersey:
Coaster vs. Tidewater, 18 N. J. Eq., 54.
New York:
Taylor vs. Porter, 40 Am. Dec., 274.
In re Eureka Basin, 96 N. Y. Ct. Ap., 45.
In re Tuthill, 49 L. R. A., 781.
Delafield vs. Brady, 15 N. E., 428.
North Carolina:
Cozad vs. Kanawha, 1 L. R. A. ns, 969.
Oregon:
Grand Ronde vs. Drake, 78 Pac., 1031.
Witham vs. Osburn, 4 Ore., 319.
Hood River vs. Wasco, 57 Pac., 1017.
Fanning vs. Gilliland, 61 Pac., 636.
Ohio:
Cooper vs. Williams, 5 Ohio, 393.
Pennsylvania:
Philadelphia vs. ————, 88 Atl.,487.
Peifly vs. Mt. Water Supply, 63 Atl., 751.
Rhode Island:
Re Condemnation of Land, 52 L. R. A., 879.
Texas:
Nalle vs. Austin, 21 S. W., 375.
Vermont:
Re Barre Water Co., 9 L. R. A., 195.
Avery vs. Vermont, 59 L. R. A., 817.
Tyler vs. Beacher, 8 Am. Rep., 398.
Virginia:
Fallsburg vs. Alexander, 61 L R. A., 129.
West Virginia:
Pittsburgh vs. Benwood, 2 L. R. A., 680.
Hench vs. Pritt, 57 S. E., 808.
Wisconsin:
Wisconsin Water Co. vs. Winans, 54 N. W. 1003.
Wisconsin River Co. vs. Pier, 21 L. R. A., ns, 538.

Osborne vs. Hart, 24 Wis., 89.
In re Theresa Drainage Dist., 63 N. W., 288.
Attorney General vs. Eau Claire, 37 Wis., 400.

In Taylor vs. Porter, supra, the Supreme Court of New York, speaking by J. Bronson, said:

"But the question does not necessarily turn on the section granting legislative power. The people have added negative words, which should put the matter at rest. 'No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers'; Const., Art. 7, Sec. 1. The words, 'By the law of the land,' as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with' the 'legislative power of the state; but no one shall be disfranchised or deprived of any of the rights or privileges' of a citizen, unless you pass a statute for that purpose,; in other words, 'You shall not do wrong, unless you choose to do it'" The section was taken with some modifications from a part of the twenty-ninth chapter of Magna Charta, which provided, that no freeman should be taken, or imprisoned, or be disseized of his freehold, etc., but by lawful judgment of his peers, or by the law of the land. Lord Coke in his commentary upon this statute says, that these words 'by law of the

land,' mean 'by due course and process of law'; which he afterwards explains to be, 'by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law.' 2 Inst. 45, 50."

In Sadler vs. Langham, supra, the Supreme Court of Alabama said:

"Another, and perhaps more valuable provision of our constitution, declares that the citizen shall not be deprived, of his 'property, but by due course of law'. Without intending at this time to define the full meaning of the constitutional phrase, due course of law, it evidently does not mean a transfer of property by mere legislative edict, from one person to another. Nor will the usurpation be healed, by bringing a judicial tribunal to sit as a passive witness to the ceremony. The due course of law, by which a citizen may be deprived of his property, is somehting more substantial than this,—Dorman vs. The State, at the present term (34 Ala. 216).

We feel justified in laying down the following rules:

1. The legislature cannot, either with or without compensation, take private property for private use.—1 Bl. Com. 139; B. & L. R. Cor. vs. S. & L. R. Co., 2 Gray 137 (61 Am. Dec. 444); Taylor vs. Porter, 4 Hill, 140 (40 Am. Dec. 274); Embury vs. Conner, 3 N. Y. 511 (53 Am. Dec. 325); Ten Eyck vs. D. & R. C. Co., 18 N. J. Law, 200 (37 Am. Dec. 233); Varvick vs. Smith, 5 Paige 137 (28 Am. Dec. 417); Parham vs. Justices, etc., 9 Ga. 341; Hall vs. Boyd, 14 Ga. 1; (Ex parte Martin) 13 Ark. 198 (58 Am. Dec. 321); Wilkinson vs.

Leland, 2 Pet. 657 (7 L. Ed. 542)."

In Nesbitt vs. Trumbo, supra, the Supreme Court of Illinois, after citing many cases holding that it was against the law of the land to take private property for private use, said:

> "These, so far as we have had time for examination, are the cases in which the principle has been applied under constitutional provisions, if not similar, substantially the same as those contained in ours. And they seem to fully sustain the objection that the law is unconstitutional ,and that the legislature is powerless to afford the means by which a person can procure the right of way over another person's land without his consent. His right seems to be supreme, except where it is needed for public use, and then he must be compensated before it can be taken.
>
> "Nor can there be the slightest pretense in this case that this way was, in any just sense, for public use. It was alone for individual or private use. From these decisions, the doctrine seems to be too well and firmly established, whatever may have been our preconceived opinions, to be now shaken. And to hold that the legislature might exercise this power would doubtless open the way to other and more serious encroachments upon the right of property, which was designed to be secured by this most salutary provision. In the light of these authorities, we feel compelled to hold this provision of law unconstitutional."

In Wild vs. Deig, supra, the Supreme Court of Indiana condemned as unconstitutional, a law authorizing eminent domain proceedings to ob-

tain a private way of necessity, and said:

"The constitutionality of the provision depends upon the power of the legislature to authorize the appropriation under the right of eminent domain. In case of the Water Works Co. etc., vs. Burkhard, 41 Ind. 364, it was said that 'the right of eminent domain, that is, the ultimate right of the sovereign power to appropriate, not only public property but the private property of all the citizens within the territorial sovereignty, to public purposes, is inherent in the government. * * * It is to be exercised only when the public exigencies require it. * * * If the legislature attempts, under the power of taking property under the right of eminent domain, to take property confessedly not for public use, then the courts may prevent it.' Mr. Cooley, in his work on Constitutional Limitations, says: 'It is conceded on all hands that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is applied for the public benefit. * * * It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such a case would be the property of him for whom it was established.' "

In Osborn vs. Hart, supra, the Supreme Court of Wisconsin, in denying that a private way of necessity could be obtained by eminent domain proceedings, said:

"When, therefore, land is taken for a private road, under our statute, it is taken for a

private and not a public use; the public has no right to use the road, but it is laid out solely for the benefit and convenience of the applicant. In some of the states it has been held that these roads, although termed private, yet were in fact public roads so far as the right to use them was concerned, and upon this ground the power of the legislature to authorize them to be laid out has been sustained,"—

"But this question whether the legislature can authorize private roads to be opened through the land of persons not consenting thereto, even upon making compensation, has been so fully discussed in Taylor vs. Porter, supra; Sadler vs. Langham, 4 Ala. 311; and Dickey vs. Tennison, 27 Mo. 373, that further remarks here seem to be unnecessary. These cases, and many others which might be cited to the same point, while fully recognizing the doctrine of eminent domain, by which private property may be appropriated to the public use upon compensation being made therefor, still deny that it can be taken for strictly private purposes without the consent of the owner, whether compensation is made or not. And it seems to us that the assertion of a right on the part of the legislature to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest is not promoted thereby, is claiming a despotic power, and one inconsistent with every just principle and fundamental maxim of a free government."

In Witham vs. Osborn, supra, the Supreme Court of Oregon held that it was contrary to the law of the land to permit condemnation for pri-

vate ways of necessity and said:

> "All separate interests of individuals in property are held by the government under the tacit agreement, or implied reservation, that the property may be taken for public use upon paying a fair compensation therefor, whenever the public interest or necessities require that it should be so taken. The right of eminent domain does not, however, imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for full compensation, when the public interest will in no way be promoted by such transfer."

In Gillan vs. Hutchinson, supra, the Supreme Court of California, said:

> "The legislature has no power to take the property of one person and give it to another."

In Bankhead vs. Brown, supra, Judge Dillon, in holding a private way statute to be unconstitutional, relied on the constitutional provision that no person shall be deprived of life, liberty or property without due process of law, and said:

> "Wherever, by any well-considered decision private roads have been sustained, it was because they were regarded as public in their character; and if properly so regarded, laws authorizing their establishment would doubtless be valid'.'

The New York constitution, Sec. 7, Art. 1, which provides:

"* * * Private roads may be opened in the manner to be prescribed for roads; but in every case the necessity for the road, and the amount of all damages to be sustained by the opening thereof, shall be determined by a jury of freeholders."

Yet, the Supreme Court of New York held that a private way of necessity cannot be acquired by eminent domain proceedings, and that the statute so providing is unconstitutional and void.

Taylor vs. Porter, 40 Am. Dec. 274 (N. Y.)

GENERAL VIEWS OF TEXT WRITERS.

As applied to so called private ways of necessity, the text writers very generally condemn as unconstitutional laws which permit such private ways to be acquired under the eminent domain power.

Elliott, Roads and Streets, 3rd Ed. 215.
Tiedman, State and Federal Control, Sec. 141.
Cooley, Constitutional Limitations, 7th Ed., 763.
15 Cyc., 579.
1 Lewis, Eminent Domain, 3rd Ed., 520.
10 R. C. L. Eminent Domain, Sec. 36.
McGehee, Due Process of Law, 269.

Elliott, Roads and Streets, supra:

"Roads and streets used by the public, with a right in all the public to use them are undoubtedly public, and private property may be appropriated for the purpose of constructing such ways. The test is, not simply how many

persons do actually use them, but how many have a free and unrestricted right in common to use them; for, if the public generally are excluded, the way must be regarded at a private one, if the public have the right to use the way at pleasure and on equal terms, it is a public one, although in reality it is little used. If it is a public road, open to all who desire to use it, the fact that it accommodates but a limited portion of the public, even where it is ordinarily used by only a single family, has been held to make no difference. Where the way is a private one the right of eminent domain cannot be successfully invoked."

Tiedman, State and Federal Control:

"The authorities are unanimous in the recognition of the abstract proposition, that the legislature cannot in the exercise of the right of eminent domain, even when the compensation is made on the most liberal terms, take the land from a private owner and appropriate it to any but a public use."

Cooley, Constitutional Limitations, supra:

"The right of eminent domain," it has been said, "does not imply a sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer." It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by an exercise of this right."

15 Cyc. 579, supra:

"The lack of power to authorize the taking

of private property for private use does not depend upon any constitutional restriction, but upon the fact that it would not be an exercise of the power of making laws or rules of civil conduct which is a branch of civil power permitted to the legislature."

1 Lewis, Eminent Domain, supra:

"It has never, we think been decided in any case that private property could be condemned for a private road for the exclusive use of the applicant, and we know of no principle upon which such a proceeding can be justified."

10 R. C. L., Eminent Domain, Sec. 36, supra:

"As a general proposition it may be stated that a private road cannot be laid out without the consent of the owner of the land over which it passes, and a statute which purports to give authority to do so, is unconstitutional and void."

McGehee, Due Process of Law, supra:

"But whatever the view as to the test of a public use, the courts are united on the proposition that the power of eminent domain does not justify a taking for private purposes merely, as when the property is transferred from one person to another, or to several persons for their peculiar benefit and advantage even though the compensation is provided for."

The notes to the following cases show that the great weight of authority is that a strictly private road cannot be obtained under the emi-

nent domain power against the consent of the owner.

Zircle vs. So. Ry Co., 102 Am. St. Rep. 826, (Va.)
Henderson vs. Lexington, 22 L. R. A. ns 102, (Ky.)
Ozark Coal Co. vs. Penn. Ann. Cases 1912 D. 1006.
Varick vs. Smith, 28 Am. Dec., 423.

As between individuals, no necessity, however great, can compel or require any man to part with one inch of his estate.

Pittsburgh vs. Benwood, 2 L. R. A. 681 (W. Va.)

PRIVATE WAYS UNCONSTITUTIONAL.

The following states, in cases here cited, have decided that private road statutes are unconstitutional, because a taking of private property for private use.. In said states, the state constitutions provided for the taking of private property for public use, upon making just compensation, and by implication, forbid taking private property for private use. In each instance, the private road was strictly private and not usable by the public as of right.

Alabama:
Sadler vs. Langham, 34 Ala. 311.

Arkansas:
Ozark vs. Penn. Anthracite R. Co., Am. Cases, 1912 D. 1006.

California:
Gillan vs. Hutcheson, 16 Cal., 154.

Illinois:
Nesbitt vs. Trumbo, 89 Am. Dec., 292.
Crear vs. Crosby, 40 Ill., 176.
Sholl vs. German Coal Co., 59 Am. Rep.379.

Indiana:
Logan vs. Stogdale, 8 L. R. A., 58.
Wild vs. Deig, 13 Am· Rep., 399.

Iowa:
Bankhead vs. Brown, 25 Ia., 540.
Richards vs. Wolff, 82 Ia., 358.

Kansas:
Clark vs. Commissioners, 66 L. R. A., 967.

Kentucky:
Sahke vs. Frazer, 21 S. W., 583.

Maryland:
Arnsperger vs. Crawford, 70 L. R. A., 497.

Missouri:
Dickey vs. Tennison, 27 Mo., 373.

Nebraska:
Welton vs. Dickson, 22 L. R. A., 496.

New York:
Taylor vs. Porter, 40 Am. Dec., 274.

North Carolina:
Cozad vs. Canawha, 1 L· R. A. ns 969.

Oregon:
Witham vs. Osburn, 4 Ore., 319.

Rhode Island:
Re Condemnation, 52 L. R. A., 879.

South Carolina:
Mays vs. Seaboard, 56 S. E., 30.

Tenessee:
Clark vs. White, 2 Swan, 540.

Wisconsin:
Osborne vs. Hart, 24 Wis., 89.

West Virginia:
Varner vs. Martin, 21 W. Va., 534.
Hench vs. Pritt, 57 S. E., 808.
Scott vs. Wolford, 59 S. E., 516.

Virginia:
Lewis vs. Washington, 5 Gratt., 265.

SO CALLED PRIVATE ROADS ACTUALLY PUBLIC.

In a number of states, so called private road statutes have been sustained because in fact they were public, and subject to use by the public and afforded the private owner opportunity to perform public duties.

Arkansas:
Roberts vs. Williams, 15 Ark., 43.

California:
Sherman vs. Buick, 32 Cal., 242.
Madera vs. Raymond, 72 Pac., 915.
Los Angeles vs. Reyes, 32 Pac., 233.

Delaware:
In re Hickman, 4 Harr., 580.
Idaho:
Latah vs. Peterson, 16 L. R. A., 81, and note.
Iowa:
Johnson vs. Board, 15 N. W., 856.
Phillips vs. Watson, 18 N. W., 659.
Kentucky:
Robinson vs. Sope, 12 Bush,. 21.
Chespeake vs. Moreland, 16 L. R. A. ns 479.
Cody vs. Rider, 1 S. W., 2.
Massachusetts:
Denham vs. County Com., 108 Mass. 202.
New Hampshire:
Proctor vs. Andover, 42 N. H., 348.
New Jersey:
Perrine vs. Farr, 22 N. J. L., 358.
Alleen vs. Stevens, 29 N. J. L., 509.
Ohio:
Shaver vs. Starrett, 4 Ohio, 495.
Oregon:
Fanning vs. Gilliland, 61 Pac., 636.
Towns vs. Klamath, 53 Pac., 604.
Texas:
Galveston vs. Baudat, 45 S. W., 939.

U. S. SUPREME COURT CASES.

The cases from this court which will be relied upon by the other side to justify the taking of our private property for private use, are:

Clark vs. Nash, 198 U. S., 361.
Strickley vs. Highland, 200 U. S., 529.
Hairston vs. Danville, 208 U. S., 598.
Union Lime Co. vs. Chicago, 233 U. S., 211.
Mt. Vernon vs. Alabama, (decided Jan. 24, 1916.) 7 Current Adv. Sheets U. S. Rep 234.
O'Neill vs. Leamer, 3 Current Adv. Sheets U. S. Rep. 54.

Our position is that these cases do not sustain the taking of private property for private use. In

each of them, the court held that the use was, under the state laws, or decisions, or policy, a public use.

Clark vs. Nash, 198 U. S., 361 (supra) was a condemnation suit to acquire a right of way in favor of an individual land owner across his neighbor's land for an enlargement of an irrigation ditch, to enable him to irrigate his land. In the state court (27 Utah 158; 75 Pac., 371) the decision was based on a statute (Rev. Stat. Utah 1898, Sec. 3588) which declared the use of ditches for domestic or irrigation purposes to be a public use. The statute is set out in terms in the decision in the lower court. The decision in this court was based upon the ground that in the state of Utah the use of water for purposes of mining, irrigation or manufacturing was a public use. This court said:

> "This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a state, as also its courts, must, in the nature of things, be more familiar with such facts, and with the necessity, and occasion for the irrigation of the lands, than can any one be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their due weight with the state courts. Fallbrook

Irrig. District vs. Bradley 164 U. S., 112; 159; 41 L. Ed. 369, 388; 17 Sup. Ct. Rep., 56. It is true that in the Fallbrook case, the question was whether the use of the water was a public use when the corporation sought to take land by condemnation under a state statute for the purpose of making reservoirs, and digging ditches to supply land-owners with the water the company proposed to obtain and save for such purposes. This court held that such use was public. The case did not directly involve the right of a single individual to condemn land under a statute providing for that condemnation.

"We are, however, as we have said, disposed to agree with the Utah court with regard to the validity of the state statute which provides under the circumstances stated on the act, for the condemnation of the land of one individual for the purpose of allowing another individual to obtain water from a stream in which he has an interest, to irrigate his land, which otherwise would remain absolutely valueless."

But from what later follows in the opinion, it is clear that this court did not agree to the broad proposition contended for by counsel in this case, that the taking of private property for private use is authorized by the 14th amendment to the federal constitution. The court proceeds:

"But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural

resources of a state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of the opinion that the use is a public one, although the taking of the right of way if for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained. Other land owners adjoining the defendant in error, if any there are, might share in the use of the water by themselves taking the same proceedings to obtain it and we do not think it necessary, in order to hold the use to be a public one, that all should join in the same proceeding, or that a company should be formed to obtain the water that the individual land-owner might then obtain his portion of water from the company by paying the agreed price, or the price fixed by law."

Strickly vs. Highland, 200 U. S., 529, (supra) is also a Utah case. The court sustains the condemnation of a right of way across a placer mining claim for an aerial bucket line of a mining corporation, under a Utah statute, which, in general terms, declared:

"* * * the right of eminent domain may be exercised in behalf of the following public uses: * * * (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines." (Utah Rev. Stat., 1898, 3588.)

Speaking of Clark vs. Nash, supra, the court said:

> "That case established the constitutionality of the Utah statute, so far as it permitted the condemnation of land for the irrigation of other land belonging to a private person, in pursuance of the defined policy of the state. In discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundation of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances would be left wholly to voluntary consent. In such unusual cases there is nothing in the 14th Amendment which prevents a state from requiring such concessions. If the state Constitution restricts the legislature within the narrow bounds, that is a local affair, and must be left where the state court leaves it in a case like the one at bar."

The Supreme Court of Utah in Strickley vs. Highland, (28 Utah 215; 78 Pac., 296) expressly held that the aerial bucket line came within the scope of the statute making roads and tramways in the developing and working of mines, a public use. That is to say, the policy of the state of Utah, as shown by statute, and decisions, was that the aerial bucket line was for a public

use, and the decision of this court merely adopted that construction. It is not a holding that private property can be condemned for a private use; but that under the conditions, policy, statute, and decisions, the use was public.

Hairston vs. Danville, 208 U. S., 598 (supra) sustained a condemnation by a railway company for a spur track, which was claimed to be for a private use. The spur track was to reach a private industry.

In that case the court said:

> "We assume that if the condemnation was for a private use, it is forbidden by the 14th amendment."

The court considered whether the uses of the spur track for which the land was taken were private. The court again considered the case of Clark vs. Nash (supra) and Strickley vs. Highland (supra) and assumed that the taking was for public uses under the state statute, and said:

> "Here the proposed spur track can be used, and was designed to be used, not only for access to the factory of the tobacco company, but for the storage of cars to be laden or unladen by receivers and shippers of freight to relieve the congestion of business, which, through the growth of the town, overburdened the limited trackage of the railroad. We think the court below was justified in finding

that the superintendent testified accurately when he said: 'In order to meet the demands of business, therefore, it is absolutely necessary to obtain more and better terminal facilities, and at the same time reach the plant of the Rucker & Witten Tobacco Company,' and 'It will be for the use of the public, in that cars loaded with carload shipments * * * will be placed on these tracks to be loaded by shippers. This testimony describes a use which is clearly public."

Union Lime Company vs. Chicago, 233 U. S., 211, (supra) was a condemaniton case for a spur track. The proceeding was resisted upon the ground that it was sought to be taken for a private, and not a public use. This court said:

"The state, through its highest court, declared the use to be a public one, and we should accept its judgment unless it is clearly without ground. Fallbrook Irrig. Dist. vs. Bradley, 164 U. S., 112, 160; 41 L. Ed. 369, 389; 17 Sup. Ct. Rep., 56; Clark vs. Nash, 198 U. S., 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Strickley vs. Highland Boy Gold Min. Co. 200 U. S. 527, 531, 50 L. Ed. 581, 583, 26 Sup. Ct. Rep. 301, 4 Am. Cas. 1174; Offield vs. New York, N. H. & H. R. Co. 203 U. S 372, 377, 51 L. Ed. 231, 236, 27 Sup. Ct. Rep. 72; Hairston vs. Danville & W. R. Co. 208 U. S. 598, 607, 52 L. Ed. 637, 641, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008. The general authority to exercise the power of eminent domain for the construction of spurs is found in 1831a Stat. (Wis.) which provides: 'Every railway company * * * may build,

maintain and operate branches and spur tracks from its road or any branch thereof to and upon the grounds of any mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, * * * and every such company may acquire by purchase or condemnation in the manner provided in this chapter for the acquisition of real estate for railway purposes, other than for its main track, all necessary roadways and rights of way for such branches, spur tracks,' etc. The supreme court of the state sustained the validity of this provision in Chicago & N. W. R. Co. vs. Moorehouse, 112 Wis. 1, 56 L. R. A. 240; 88 Am. St. Rep. 918, 87 N. W. 849, holding, (p 11) that 'the fact that a spur track may run to a single industry does not militate against the devotion of the property thereto being a public use thereof, so long as the purpose of maintaining the track is to serve all persons who may desire it, and all can demand, as a right, to be served without discrimination."

Mt. Vernon vs. Alabama, 7 Adv. Sheets U. S. Rep. 234, (supra) holds that the manufacturing and supplying for sale to the public of power produced by water as a motor force, is a public use, for which land, water, and water rights may consistently with the 14th amendment be condemned. The court adopted the construction placed by the supreme Court of Alabama upon the state statute. The court said:

"* * * If that is not public, we should be at a loss to say what is."

O'Neill vs. Leamer, 3 Adv. Sheets U. S. Rep. 54 (supra).

There the court had under consideration a drainage statute of the state of Nebraska under which a drainage district was organized and found to be a public utility, and conducive to the public convenience, health and welfare. The suit was brought to enjoin the construction of a drainage ditch on the ground that the enterprise was wholly private and contrary to the 14th amendment to the federal constitution. The court said:

"But we do not find that the supreme court of the state has sustained the act as applicable to any case in which it was considered, upon a judicial examination of the facts, that the undertaking served private interests alone. On the contrary we assume it to be the law of Nebraska that property may be taken in furtherance of reclamation projects only where it is found that the public welfare is involved. Acts with a different purpose have been held unconstitutional. Jenal vs. Green Island Draining Co. 12 Ned. 163, 10 N. W. 547; Welton vs. Dickson 38 Ned. 767, 22 L. R. A. 496, 41 Am. St. Rep. 771, 57 N. W. 559. With respect to the act here in question, the state court has emphatically declared that the enterprises which it contemplates are those distinctly of a public character."

Thus, in all of these cases, this court has declared that in the particular instance the private property was sought to be condemned for a public use. In each instance, the state statute had declared the use to be public and the same had been likewise declared by the courts of the said states.

But these cases are obviously not applicable in the case at bar. Here there is no statute declaring a private way of necessity to be a public use. Here the state statute declares the same to be a private use, and nothing more. The supreme court of Washington has considered the scope and constitutionality of the statute in two cases, one the case at bar:

State ex rel Mountain Timber vs. Superior Court, 77 Wash. 585.
State ex rel Grays Harbor vs. Superior Court, 82 Wash. 503.

In the Mountain Timber Company case, the decision is based squarely on the ground that the right of way was a necessary right of way. The court did not say, and did not hold, that a "private way of necessity" was for a public use, but based the decision upon the ground that the state, as sovereign, had the power to take private private property for private ways of necessity.

The decision of this cause by the supreme court of Washington, did not discuss and did not decide the question of public use. It merely followed the Mountain Timber Company decision, in holding the statute to be constitutional. Therefore it cannot be contended that the state supreme court has decided that a taking for a "private way of necessity" is a taking for a public use. The case is, in this respect, unlike the cases of:

Clark vs. Nash, 198 U. S. 361.
Strickley vs. Highland, 200 U. S., 529.
Hairston vs. Danville, 208 U. S. 598.
Union Lime Co. vs. Chicago, 233 U. S. 211.
Mt. Vernon vs. Alabama, 7 Current Adv. Sheets U. S. Rep. 234.
O'Neill vs. Leamer, 3 Current Adv. Sheets, U. S. Rep. 54.

In each of those cases, there was a state statute which declared a public use. In this case the statute declares a private use, and none other. Since two unsuccessful attempts have been made to amend the state constitution so as to provide for a right of way for the removal of timber and timber products as a public use, and defeated at the polls, it is not arguable that the policy of the state sustains the private way of necessity statute as applied in this case. The

mere submission by two legislatures of the proposed amendment to the state constitution declaring roads to remove timber to be a public use, shows the legislative understanding to be that in the absence of an amendment, the removal of timber and timber products is not a public use. The holding of the state supreme court in Healy Lumber Company vs. Morris, 33 Wash., 490, that a prior similar statute was unconstitutional, together with the long line of state decisions, heretofore cited, holding that private property cannot be taken for private purposes, under the eminent domain power, and declining to expand the phrase "public use" so as to include uses which are in fact private, although promotive of general welfare, show that the statute in question is not sustainable on grounds of state policy.

The Coats-Fordney Logging Company has a navigable highway—the east fork of the Wishkah River running through the southwest quarter of section eight. (Transcript of record 13, finding 4.) To remove the timber from this land to its railroad, this navigable river must be crossed. Having an available highway at this time, there is no necessity whatever for the con-

demnation of a right of way whereover to remove the timber from that particular tract. As to said tract, a right of way is not a right of necessity.

THE MILL DAM ACTS.

It will doubtless be argued by the other side that the mill dam acts of a number of the states in principle sustain the taking in this case. Most of these mill acts, and the decisions sustaining them, declare a public use; and the mills, such as grist mills, provided for, are required to serve the public generally, and without discrimination.

Such mill acts and decisions as are not based upon a public right, are sustained on the ground of public welfare.

"The rights granted by these laws to mill-owners are said by Chief Justice Shaw, of Massachusetts, to be 'granted for the better use of the water power, upon consideration of public policy and the general good.'"

Cooley, Constitutional Limitations, 771.

"Consequently, the only possible basis upon which the mill acts can stand is that the mills are a public use within the meaning of the constitution. This can only be true of that class of mills which are obliged to serve the public, and, unless the acts are limited to such mills, they cannot be sustained."

1 Lewis, Eminent Domain, Sec. 280.

THE QUESTION OF NECESSITY.

In those states in which private ways of necessity have been sustained, it is held that only an absolute necessity will justify the taking; that prima facie the taking is unconstitutional.

State ex rel Ayres vs. Richards, 38 Mich. 214.

A taking of private property for private road of necessity can only be justified on the plea of absolute necessity.

In re Private road, 5 Atl. 383, Pa.
The case last cited is based upon,
In re Road Plum Creek, 1 Atl., 431, Pa.
Where it was said:

"Here is the taking of private property for

private use, an assumption that is prima facie unconstitutional and can only be justified by the strictest necessity."

Vice vs. Eden, 68 S. E. 125 (Ky.)

There are four non-contiguous tracts of timber to be served by the proposed logging road.

As to the southwest quarter of section eight, the undisputed evidence, and the maps, show that the east Wishkah river flows through the lands. (Transcript of record, 13, finding 4.) The river is navigable. A driving company, which is a public service corporation, operates thereon. Down this river logs are taken to market every day in the wet season and every few days in the dry season. There is no dispute upon this point. The court by its finding No. 4, expressly found that there was no necessity for condemning a right of way to remove the timber from this tract if it is considered a tract separate from the other lands described in the petition.

Yet this land is a separate tract. It is two miles from section 10. It is over a mile to section 20. It is over two miles to section 30. To go from one tract to the other it is necessary to cross the river, a navigable highway. If the statute, under attack, justifies, as the state supreme

court says it does, the taking of our private property for the private purposes of a logging company, even though there is at present a navigable river and public highway touching the land, then it is submitted the statute is unconstitutional in its scope. It serves no public good, public use, public necessity, nor indeed any private necessity.

Southeast quarter, section ten at its nearest point is distant from the east fork of the Wish-River slightly over a mile. (Transcript of record 14, finding 5.) There is much testimony showing it to be entirely feasible to log the tract into the river. This could be done at reasonable cost.

Section twenty is distant from the east fork of the Wishkah River about one-half a mile. (Transcript of record 13, finding 3.) It could be easily logged to the river at a reasonable cost.

The undisputed evidence shows section thirty is distant from the east fork of the Wishkah River at the nearest point, about 200 feet. (Transcript of record 13, finding 2.) While the court declined to so find, yet the evidence clearly shows the cost of logging the same into the river is much cheaper than building a main rail-

road at least three-quarters of a mile in length, and then one-half a mile of spur track.

In any event, no public use, nor public good, is served by taking our private property in order that this section be logged by railroad a longer distance instead of to the river two hundred feet from the west line of the land.

In Bloodgood vs. M. & H. R. R. Co., 18 Wend. 58, in considering the limitations upon the power of eminent domain, is cited: Burlemaque, Principles of Law, 145 Grotius, Boecler, and Bynkerschoeck, to the effect that the right of eminent domain is not to be exercised,

> "Except in cases where it is absolutely necessary for the public good."

A way of necessity never exists where a man can get to his own property through his own land, however inconvenient the way to his land may be.

Dee vs. King, 50 Atl. 1109 (Vt.).
Shake vs. Frazer, 21 S. W. 583 (Ky.).

Even though it would be more convenient or less expensive for the Coats-Fordney Co., this is not a necessity such as will warrant condemnation.

1 Lewis Eminent Domain, 521.

There is another available route and the question of necessity should have been answered in the negative.

State ex rel Spokane vs. Superior Court, 40 Wash., 389.

SUMMARY.

The taking attempted in this case is for a private use. The judgment of the trial court so decided. The state statute on which the case is based is a private use statute. The title so declares and the body of the statute so states. The taking under this statute is justified under the state constitution which provides for the condemnation of private ways of necessity. We contend the state constitution is not intended to apply to a private way of necessity for a logging railroad. It applies only to private ways of necessity for agricultural, domestic and sanitary purposes. But whether this contention be

sound or not, the taking, the state statute, and the state constitution are contrary to a fundamental principle of our national government; that private property can be taken for public use only.

The state in this instance has not elevated to public use private ways of necessity. Neither by legislation, nor by judicial decision, has the State of Wsahington declared, as a matter of state policy, or otherwise, that the taking of private property for private ways of necessity, promotes the public welfare, public convenience, public interest, or serves a public use.

If the Coats-Fordney Logging Company takes our property and builds a logging railroad, the public will be excluded and without right to use it; public money cannot be used thereon; the logging road can be closed and abandoned at the pleasure of the company.

Nor is such a logging road made public by the provision that the products of the owner shall be transported over it. Our land is cut-over land—logged-off land. There are no products which this road can transport.

The federal question here presented, has been raised and argued at every stage of the proceed-

ings in this case. It is a dangerous doctrine to establish that, under the 14th amendment to the federal constitution, private property may be taken for private use.

The warning sounded by Bronson, Ch. J., in Oakley vs. Aspinwall, 3 N. Y. 569, is peculiarly applicable to the attempt made by the defendant in error to undermine the foundations sustaining the right of private property.

> "Believing as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinary constructions which are resorted to for the purpose of acquiring power * * * some evil to be avoided, or some good to be attained by pushing the powers of government beyond their legitimate boundary. It is by yielding to such influences that Constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the Legislature or the courts undertake to cure defects by forced and unnatural constructions they inflict a wound upon the Constitution which nothing can heal. One step taken by the Legislature or by the judiciary in enlarging the powers of the government opens the door for another which will be sure to follow; and so the process goes on,

until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."

Such a private way of necessity originates by the act of the private individual; it is at the cost of the private owner that it is constructed and kept in repair; and may be abandoned at the pleasure of the private individual. By every test it is strictly private and not public. These tests are fully stated in Bankhead vs. Brown, 25 Iowa, 540.

The decision of the Supreme Court in Wilkinson vs. Leland, by Story, J., and the decisions by the several state courts show that it has always been considered subversive of the rights of private property to permit condemnation for private use. This principle was firmly established in Magna Charta. It was part of the laws of the land of England. It became part of the law of the land of the United States. It is within the protection of the fourteenth amendment to the Federal constitution. That amendment provides:

"* * * Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws."

This point—the right to take private property for private use—was considered by this court in Missouri Pacific Railway Co. vs. Nebraska, 164 U. S., 403. Therein it was said:

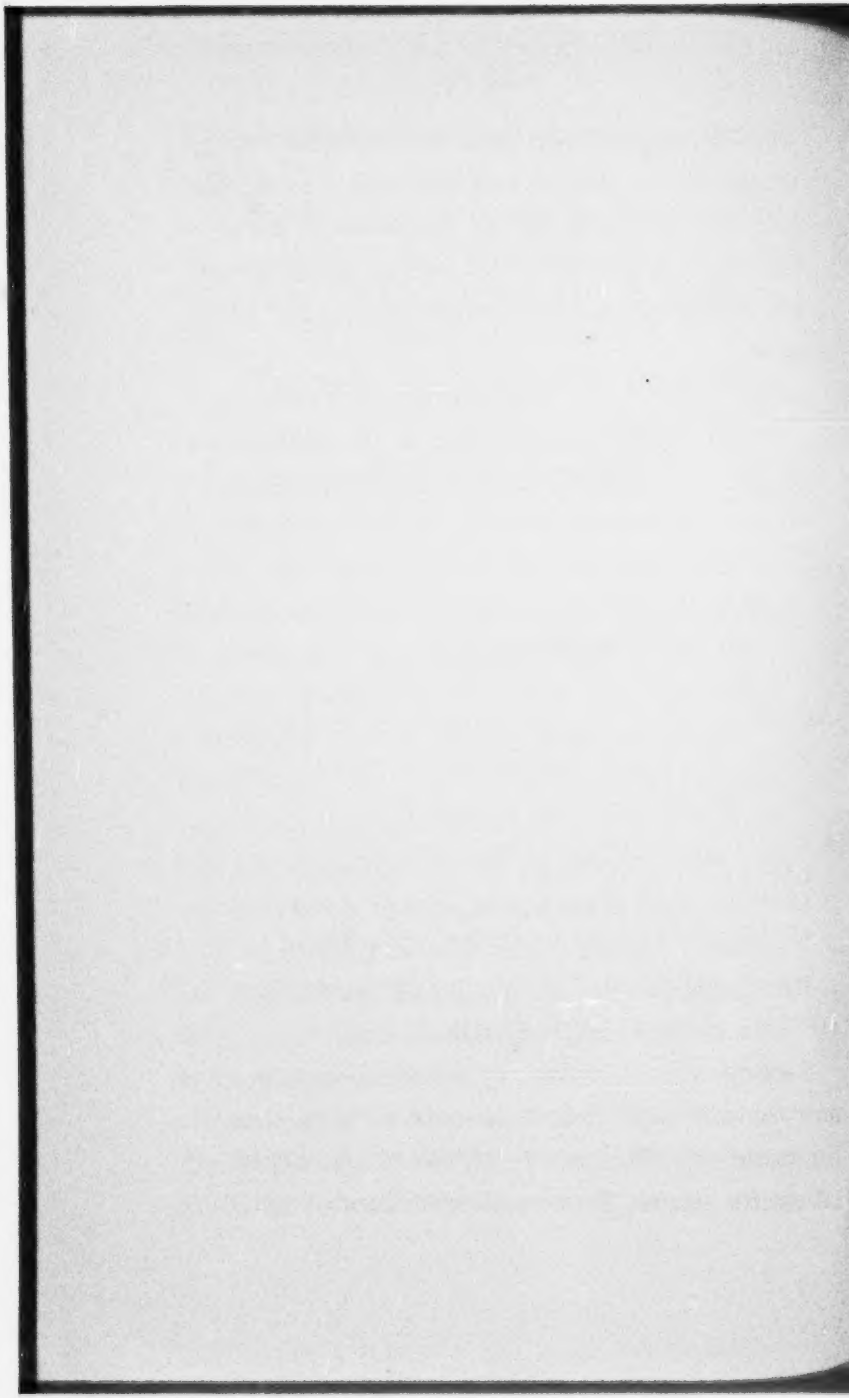
> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States."

For the reasons given in this brief, we respectfully request that the judgment and decree of necessity of the Superior Court of Washington, for Chehalis County, and the judgment of affirmance thereof by the Supreme Court of Washington, be reversed, and that the proceedings ordered dismissed as in conflict with the due process of law clause contained in the 14th amendment to the national constitution.

That in the event this court should consider the statute in question, and the state constitution, not in contravention of the 14th amendment, that nevertheless the taking in this case is violative of the 14th amendment; and that the the decrees appealed from be modified so as to exclude the southwest quarter of section eight

for the plain reason that the Coats-Fordney Logging Company at this time has a navigable highway—the east fork of the Wishkah River—flowing through said land and no necessity exists justifying the furnishing of another highway.

Respectfully submitted,
W. H. ABEL and A. M. ABEL,
Attorneys for Plaintiffs in Error.



APPENDIX.

ARTICLE OF THE STATE CONSTITUTION RELATIVE TO THE EXERCISE OF THE POWER OF EMINENT DOMAIN.

AN ACT providing for the amendment of section 16 of article one (1) of the Constitution of the state of Washington, relating to the exercise of the power of emnient domain.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1 * * * * Sec. 16. Private property may be taken, under such terms, conditions and limitations as shall be prescribed by the Legislature for drains, flumes, and ditches for agri-

cultural, domestic, and sanitary purposes, and for rights of way for the removal of timber or timber products, and the appropriation and use of property for such purposes are hereby declared to be public usage, even though such appropriation and use may inure to the special benefit of some private individual, firm, corporation, or association. PROVIDED HOWEVER, That this declaration as to public uses shall not be construed to limit the right to appropriate property for other public uses. Private property shall not be taken for private use, except for private ways of necessity. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits fro many improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private

property for a use alleged to be public, the question whether the contemplated use be really public, shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public, except as to the uses which are herein declared to be public. * * * "

Session Laws, 1907, 112-113.

RELATING TO PRIVATE WAYS OF NECESSITY.

AN ACT relating to the taking of private property for private ways of necessity and for drains, flumes, and ditches, on or across the lands of others for agricultural, domestic or sanitary purposes.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. An owner, or one entitled to the beneficial use of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct and maintain any drain, flume, or ditch,

on, across, over or through the land of such other, for agricultural, domestic, or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such drain, flume, or ditch, as the case may be. The term "private way of necessity," as used in this act, shall mean and include a right of way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried.

Section 2. The proceedure for the condemnation of land for a private way of necessity or for drains, flumes or ditches under the provisions of this act shall be the same as that provided for the condemnation of private property by railroad companies, but no private property shall be taken or damaged until the compensation to be made therefor shall have been ascertained and paid as provided in the case of condemnation by railroad companies.

Section 3. That any person or corporation

availing themselves of the provisions of this act for the purpose of acquiring a right of way for a logging road, as a condition precedent, contract and agree to carry and convey over such roads to either termini thereof any of the timber or other produce of the lands through which such right is acquired at any and all times, so long as said road is maintained and operated and at reasonable prices; and a failure so to do shall terminate such right of way. The reasonableness of the rate shall be subject to determination by the public service commission.

Session Laws, 1913, 412-3.
3 Remington & Ballinger, Sec. 5857 et seq.

STATE CONSTITUTION REGARDING EMINENT DOMAIN.

"EMINENT DOMAIN—Private property shall not be taken for private use, except for private ways of necessity, or for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be

first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question and determined as such, without regard to any legislative assertion that the use is public."

Constitution of State of Washington, Art. 1, Sec. 16.
(1 Remington & Ballinger, 38-39.)

TO AMEND STATE CONSTITUTION RELATIVE TO THE EXERCISE OF THE POWER OF EMINENT DOMAIN.

AN ACT, providing for the amendment of section 16 of Article one (1) of the Constitution of the State of Washington, relative to the exercise of the power of eminent domain.

BE IT ENACTE DBY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. * * * Section 16. Private property may be taken, under such terms, conditions and limitations as shall be prescribed by the Legislature for drains, flumes, and ditches for agricultural, domestic, and sanitary purposes, and

for flumes, ditches, canals, reservoirs, or rights of way through on or across the land or waters of property of others for mining, milling, manufacturing, irrigation and lumbering purposes, or for the removal of timber or timber products, and the appropriation and use of property for such purposes are hereby declared to be public uses, even though such appropriation and use may inure to the special benefit of some private individual, firm, corporation, or association; PROVIDED HOWEVER, That this declaration as to public uses shall not be construed to limit the right to appropriate property for other public uses. Private property shall not be taken for private uses, except for private ways of necessity. No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporations, which compensation shall be ascertained by a jury, unless a jury be waived,

as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public, except to the uses which are herein declared to be public. * * *.

Session Laws, 1905, 124-5.

No. 244737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 132.

THE STATE OF WASHINGTON EX REL. GRAYS HARBOR LOGGING COMPANY AND W. E. BOEING, PLAINTIFFS IN ERROR,

vs.

THE SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY AND COATS-FORDNEY LOGGING COMPANY, DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Washington.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

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Received _____ copies of foregoing brief this _____ day of December, 1916.

_____

Of Attorneys for Defendants in Error.

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THE SUPERIOR COURT OF WASHINGTON FOR CHEHALIS COUNTY AND COATS-FORDNEY LOGGING COMPANY, DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Washington.

THE TAKING IN THIS CASE.

At every stage, the Plaintiffs in Error have urged that the taking of their property in this case is without due process of law, contrary to the 14th Amendment.

The Answer Brief does not, we think, satisfactorily consider the nature and extent of said taking. Whether or not the State statute or the State constitution contravenes the 14th Amendment, we submit it yet remains true that the taking, without necessity, as the Trial Court found, of a right-of-way over our lands for the purpose of removing the timber from the southwest quarter of Section 8 cannot constitutionally be sustained.

The only consideration Defendants in Error give this point is at pages 76 to 78 of their brief.

The State Constitution provides for private ways of necessity. The State statute gives to:

> "An owner or one entitled to the beneficial use of land which is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity * * * on, across, over or through the land of such other * * * may condemn and take lands of such other sufficient in area for the construction and maintainance of such private ways of necessity."

This statute undertakes to give a right of condemnation to landowners *as such;* not to owners of logging railroads as such. It is in virtue of the ownership of a tract of land, lacking access, that the right to condemn a private way of necessity exists. As applied to the southwest quarter of Section 8, the statutory condition for the exercise of the right is absent. Defendants' Exhibit "C," page 110, printed Record, is a map of the Township. It shows the southwest quarter of Section 8 with the east fork of the Wishkah river flowing through it. This river is a navigable highway, as the Supreme Court of the state in

its opinion decided. The record shows, and it will not be denied, that this navigable highway has been improved by a Driving Company at an expense of some Sixty Thousand Dollars. Having a public highway which crosses this tract, how can it justly be claimed that the Defendant in Error is entitled to condemn another and a private way over which to remove the timber thereon?

Plaintiffs' Exhibit "C" (being the last map but one in the Printed Record), shows a proposed route for the logging railroad, extending across our lands (the northwest quarter of Section 32) and diagonally through the Township through Sections 29, 20, 16 and 9. That is, the proposed logging railroad may be located about one mile from the southwest quarter of Section 8, *with a navigable river between the railroad and said tract.* To remove the timber therefrom to the logging railroad, it will be necessary to cross this navigable highway, which is operated under the state statute by a public service corporation. Certainly as to this quarter section, a logging railroad right-of-way is not a necessity, after crossing our land, of course the defendant in error may locate its logging railroad at its discretion.

Defendant in Error chooses to lump its timber holdings and treat the same as a solid body. They are not such in fact. Section 30 is only 200 feet from the same navigable highway—the east fork of the Wishkah river. Section 30 corners on Section 20, but is fully two miles from the southwest quarter of Section 8 and nearly three miles from the southwest quarter of Section 10. Section 20 is fully one mile from the southwest quarter of Section 8. The southwest quarter of Section 10 is one and one-half miles from the southwest quarter of Section 8, and as shown by the map, is on the other side of the divide.

The Trial Court made the following finding on this subject:

> "That the petitioner owns Section 30, in said township, 19 north range 8 west. That said section contains about 16,000,000 feet of merchantable timber. That the east fork of the Wishkah river is distant from the west line of said lands about 200 feet.
>
> Found. Exception allowed petitioner.
>
> MASON IRWIN, *Judge.*"

> "That Section 20 in said Township 19 north range 8 west, contains about 20,000,000 feet of merchantable timber; that said land is distant from the east fork of the Wishkah river at the nearest point, about one-half mile.
>
> Found. Exception allowed petitioner.
>
> MASON IRWIN, *Judge.*"

> "That the southwest quarter of Section 8 in said Township is owned by petitioner; that the east fork of the Wishkah river touches one corner of said lands and the same can be logged into said river; *that no necessity exists for condemning the right of way for the removal of the timber from said southwest quarter of Section 8, if it is considered as a tract separate from the other lands of petitioner.* That there is about 4,500,000 feet of merchantable timber upon said land.
>
> Found. Exception allowed petitioner.
>
> MASON IRWIN, *Judge.*"

The Supreme Court, overlooking that under the statute at bar the right to condemn exists only in favor of landowners, and not in favor of owners of logging railroads, nor the owner of "enterprises," said, in its opinion deciding against us:

"II. If the southwest quarter of Section 8 which borders upon the east fork of the Wishkah river was the only property to be reached by the proposed road, it might well be held that there was not a sufficient reason to justify the condemnation of a private way of neceessity for a logging road, *since from that particular tract there is an adequate outlet by water.* The statute provides that when land is so situated with respect to other land that it is 'necessary for its proper use and enjoyment to have a private way of necessity,' the right of condemnation exists.

Laws of 1913, Chap. 133, p. 412."

"The word 'necessary' as used in the statute means reasonable necessity.

Samish River Boom Co. vs. Union Boom Co., 32 Wash., 586.

State, ex rel. M. Timber Co. vs. Superior Ct., 77 Wash., 585."

"In determining whether a reasonable necessity exists for the condemnation, it is necessary to look at the *entire enterprise* rather than to its segregated parts. The Coats-Fordney Logging Company was conducting its logging operations by means of a logging railroad. To log in this manner it was already equipped. Only one of the four tracts of land which it was seeking to reach was located upon the river. To sustain the right to condemn so far as it pertained to reaching the other three tracts of land and to deny it as to *this one would not seem very reasonable.* The southwest quarter of Section 8 was only one of the ten quarter sections included in the *enterprise.*"

Thus, it seems that the State Supreme Court decided against us because the Coats-Fordney Logging Company had an *enterprise,* to-wit, a *logging railroad;* and for its

convenience, not necessity, desired to log the southwest quarter of Section 8 by rail, instead of by the river flowing through said land. As stated, *the owners* of *"enterprises" have not been given the right to condemn;* but only the owners of lands.

It has been, and will be, argued, that the right to condemn, for the benefit of the southwest quarter of Section 8 is reasonably within the scope of the state statute, and the state constitution. But the point we emphasize is that it is the taking of our private property for the convenience, not necessity, of the owner of a private enterprise. The question of public use, that is, use by the public, does not apply. The question of public use, as including public welfare or public interest, and development of the resources of the State, does not apply. For neither the Trial Court nor the State Supreme Court discussed or found, in this case, that any question of public use, public welfare or public interest was involved nor served.

Even should the Court hold that the taking of our property for a private way of necessity is not in conflict with the 14th Amendment of the Federal Constitution, the decree appealed from, insofar as the southwest quarter of Section 8 is concerned, rests on a different basis, and is clearly an unconstitutional taking.

PUBLIC USE.

The Supreme Court of Washington has, in many cases, held that public use means use by the public. The decisions so holding are collected in our main brief, at pages 47 to 55.

We concede that many of the states give a broader meaning to the term "public use," and consider that any-

thing which promotes the public welfare or public interest comes within the scope of that term. Said decisions from other states, however, should not be considered in this case in passing on whether or not the taking is for a public or a private purpose.

Some contention is made by Defendant in Error that the private way of necessity statute is promotive of state welfare and, therefore, a public use statute. The statute in question is the best answer to this argument. It proclaims throughout a private purpose and a private use. (By oversight of the printer in our main brief this statute is not correctly printed. The brief of Defendant in Error at page 4 correctly quotes the statute.) There is no element of public use in the statute whatever.

The contention is further made that the State Constitution (Sec. 16, Article I, providing for private ways of necessity) should be construed as if to read that such private ways of necessity are declared thereby to be a public use. Such a construction does violence to the language of the Constitution which reads:

> "EMINENT DOMAIN — Private property shall not be taken for private use, except for private ways of necessity or for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes."

If this provision means anything, it means that private ways of necessity are not public ways. To hold otherwise is to inextricably confuse the meaning of these terms.

The irrigation cases from the State of Washington, cited by Defendant in Error, particularly the case of State, et rel., Galbraith vs. the Superior Court of Spokane, County 59 Wash., 621, their brief 25, et seq., are based

upon Section 20 of Article I of the State Constitution, which declares that the use of water for purposes of irrigation is a public use. The provision of the State Constitution reads:

> "The use of water for irrigation, mining and manufacturing purposes shall be deemed a public use."

Cases applying this provision of the Constitution are:

> Prescott vs. Flathers, 20 Wash., 154.
> State, ex rel., Tacoma, Ind. Co. vs. White River Power Co., 39 Wash., 648.
> State, ex rel., Galbraith vs. The Superior Court of Spokane County, supra.

That the uses of water for the purposes stated in Section 20 of Article I of the State Constitution are declared to be public uses, and no such public use is declared as to private ways of necessity appears to us conclusive that the latter are not public uses under the State Constitution, and State policy.

DECISIONS OF THIS COURT.

Decisions of this Court, cited in Defendant in Error's Brief, page 42, et seq., are from states in which the Constitution, statute, or policy declares a public use. This, at least, applies to all the cases except possibly that of Otis vs. Ludlow, 201 U. S., 150. That case applied a Mill Dam Act of Massachusetts, which Act, or similar Acts, have been in force for over 100 years. The principal question there was as to the right of immediate compen-

sation by the owner of the property taken. All the other cases of this Court, as we read them, were based on state declarations of public use and sustained for that reason.

O'Neill vs. Leamer, 3 Current Advance Sheets, U. S. Reports 54, applied a drainage statute of the State of Nebraska. There the taking was by a drainage district organized as a public corporation. There was a finding that the drainage would be a public utility and conducive to the public use, convenience and welfare.

In case at bar such findings are wholly lacking. All that the petition to condemn shows is an alleged private necessity for the taking of a private right of way. The decree of condemnation is no broader, and is accompanied by the finding that as to the southwest quarter of Section 8 (a separate tract) no necessity exists, viewing the same as a separate tract.

STATE DECISIONS IN SIMILAR CASES.

These cases are collected by Defendant in Error, its Brief, 50 et seq. We do not think these cases at all applicable, with a few exceptions, to be noted. Thus in the California case, Los Angeles County, vs. Reyes, 32 Pac., 233, the private way was, in fact, public and useable by the public.

This applies to Latah County vs. Peterson, 16 L. R. A., 81 (Idaho.) The other Idaho cases are based on the State Constitution, declaring "the use for any useful, beneficial or necessary purpose is declared to be a public use." This applies to the logging right of way case of

Blackwell vs. Empire Mill Company, 155 Pac., 680 (Idaho.)

The Nevada cases are based on declarations of public use contained in the State Constitution, of which the following cases are typical:

Goldfield vs. Old Sandstrom, 150 Pac., 313 (Nev.)
Mining Company vs. Sewall, 11 Nev., 349.

So, in Montana, the State Constitution declares that the use of water for irrigation purposes and for rights of ways for ditches, flumes and canals to be a public use. This constitutional provision was the basis of the decision in

Ellinghouse vs. Taylor, 48 Pac., 757.

We concede, however, that in Colorado and Georgia, under constitutional provisions somewhat similar, private ways necessity statutes have been sustained, without discussion, however, as to the possible conflict of such statutes with the 14th Amendment. These cases are:

Crystal Park vs. Morton, 146 Pac., 566.
Jones vs. Venable, 120 Ga., 1.

PRIVATE ROADS.

It is argued, page 72, its Brief, that some of the private road cases collected in our Brief are not in point. We admit that Wild vs. Deig, 13 Am. Rep., 399 (Ind.), was a private road statute and not a private way of necessity statute. It was held unconstitutional. This also applies to Osborne vs. Hart, 24 Wis., 89. It does not, however,

apply to Witham vs. Osburn, 4 Ore., 320. There this statute held invalid, was like the statute at bar, and read:

> "When any person's land shall be so situated that it has no connection with any public road" the right to condemn exists.

Practically the whole law, as stated in the decisions, on the subject of the invalidity of private roads and private ways of necessity, is collected in Vol. I of Lewis' Eminent Domain (3d. Ed.), Sec. 260.

DRAINAGE CASES.

The cases collected by Defendant in Error, at page 70, its Brief, are drainage cases. These are sustainable as an exercise of the police power and as promotive of public health. We have no quarrel with these decisions. They are not applicable.

SUMMARY.

In this case the Trial Court refused to permit us to give evidence that there was another available route over the north half of Section 31; that this other route was feasible and that the logging road could be constructed there at a reasonable cost. The Supreme Court sustained this ruling, because we did not

> "go further and show by clear and convincing evidence that, in the selection of the route sought to be condemned, there was bad faith, oppression, or an abuse of power."

This was tantamount to saying that when a private concern selects a route over the private property of another, the burden is on the owner to show a lack of necessity; that is to say a necessity will be presumed. By this course of reasoning our property is to be taken for a logging railroad, which is paralleled by a navigable river, very much nearer to the timber lands of Defendant in Error than the logging road will be. By the same means the convenience of the Defendant in Error, and not any necessity, is the basis for the taking of a right of way over which to remove the timber on the southwest quarter of Section 8. We submit this is a taking of private property for the convenience of a private company, and involves no question of public use nor public policy.

A decision invalidating the taking in this case will not result in bottling up the timber resources of the State of Washington. The very opposite will be the result. The Defendant in Error can condemn under the toll road statute as a common carrier. By so doing, other owners of timber along its logging road will have an outlet; otherwise they may be at the mercy of a private company. For logging railroads are costly and relatively few. Not every owner of timber can afford to build a logging railroad a number of miles in length. To allow a strictly private logging railroad to condemn is calculated to lock up the adjacent timber so that no one can handle it except the owner of the logging railroad.

In any event, as to the southwest quarter of Section 8, the State Court has found that no necessity existed, since there is a public navigable highway available at this time. Therefore, no question of private way of necessity, or of necessity at all, but only a question of desire and convenience exists as the basis for the taking of our private property, as to the southwest quarter of Section 8.

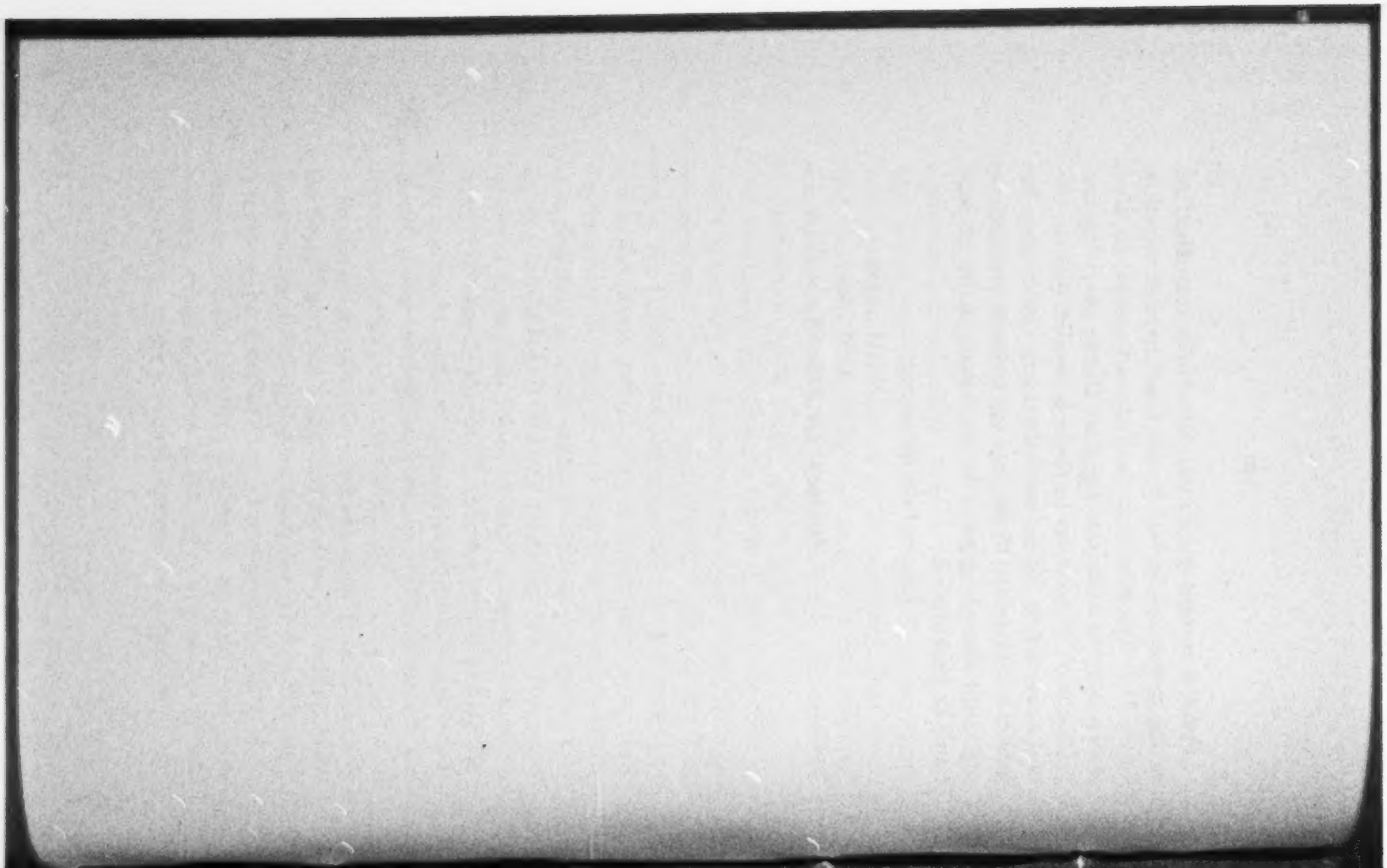
For the reasons given, we respectfully urge that the taking in this case be held by this Court to be in violation of the 14th Amendment to the Federal Constitution, that if necessary to a decision the state statute providing for private ways of necessity be declared invalid, that the liberal construction placed upon the State Constitution be held in contravention to the 14th Amendment and that, in any event, the taking as to the southwest quarter of Section 8 be held invalid.

Respectfully submitted,

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Attorneys for Plaintiffs in Error.



No. 132

FILED
JAN 5 1917
JAMES D. MAHER

Supreme Court of the United States

OCTOBER TERM, 1916. No. 132.

THE STATE OF WASHINGTON *ex rel.* GRAYS HARBOR LOGGING COMPANY AND W. B. BOBING,

Plaintiffs in Error,

against

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CHEHALIS COUNTY AND COATS-FORDNEY LOGGING COMPANY,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

SECOND REPLY BRIEF OF PLAINTIFFS IN ERROR.

W. H. ABEL AND A. M. ABEL,
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The Recorder Press, 206 Broadway, Phone Main 4687, Seattle, Wash.

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SECOND REPLY BRIEF OF PLAINTIFFS IN ERROR.

W. H. ABEL and A. M. ABEL,
Attorneys for Plaintiffs in Error.

Finality of Order and Decree.

The cases cited in our brief in opposition to the motion to dismiss because the order and decree of condemnation were not final conclusively show that

by the State practice the order and decree is a final determination of that particular branch of the case; and that as to the matters adjudicated therein no later consideration is available to these plaintiffs in error. In addition, we submit that this Court has in effect considered such a judgment to be final and reviewable by writ of error issued out of this Court in *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Company*, 240 U. S. 30; *Detroit & Macinack R. R. Co.* v. *Michigan R. R. Comm.*, 240 U. S. 564.

These cases establish that a judgment is final in the sense of the statute which determines the particular cause, or branch of a cause.

The Particular Taking in this Case.

The petition to condemn alleges (transcript of record 2):

> " that it is necessary for the proper use and en-
> " joyment of the lands owned by your peti-
> " tioner, hereinabove described, to have and
> " maintain a private way of necessity over and
> " across the said North-west Quarter (N. W. 1-4)
> " of Section 32, owned by the respondents, said
> " private way of necessity to consist of a right-
> " of-way on, across, over and through the said
> " North-west Quarter (N. W. 1-4) of Section 32,
> " owned by the said respondents, for the pur-
> " pose of constructing and maintaining thereon
> " a private logging railroad for the purpose of
> " taking over said right-of-way, and by means
> " of said logging railroad, timber products to be
> " taken from the lands of the said petitioner
> " hereinabove described."

Finding of fact No. 5 finds: " that it is neces-
" sary for the proper use and enjoyment of the
" petitioners' said lands and for the removal of
" the timber thereupon by petitioner, to have
" and maintain a private way of necessity over
" and across the said North-west Quarter (N.
" W. 1-4) of said Section 32, said private way

" of necessity to consist of a right-of-way over " and across said last named said North-west " Quarter Section of land, for the purpose of " constructing and maintaining thereon a pri- " vate logging railroad in order to take over " said right-of-way and said railroad, the tim- " ber products of the lands so owned by the " petitioner . . . " (transcript of record, 11).

The order and decree of condemnation reads:

"It is therefore ordered and adjudicated that the said petitioner is entitled to condemn and appropriate the aforesaid right-of-way for the purpose of constructing thereupon its said private logging railroad, together with all proper or necessary spurs, switches, sidings or other improvements proper or necessary in the orderly construction, maintenance and operation of its said railroad, and to maintain, equip and operate such railroad only for the following purposes, to-wit: For the removal of any and all timber products located and being upon Section 30, Section 20, the South-west Quarter of Section 10, and the South-West Quarter of Section 8, all in Township 19, North Range 8, west of the Willamette Meridian, in Chehalis County, Washington" (transcript record, 12).

It will be seen from the foregoing excerpts from the petition and findings that only a right-of-way for a private logging railroad is sought to be taken. But the order and decree of condemnation is broader than the petition and broader than the findings, and provides for:

"*Its said private logging railroad, together with all proper or necessary spurs, switches, sidings or other improvements proper or necessary in the orderly construction, maintenance and operation of its said railroad*" (transcript of record, 12).

Under this order and decree of condemnation, broader than the issues presented, the defendant in

error is permitted to take our property, not only fo a so-called private way of necessity, but *for spurs, switches, sidings or other improvements proper or necessary.* The propriety and extent of the taking is thus left to the defendant in error. At its discretion it may decide what improvements to place on our lands. This is more than a so-called private way of necessity.

For example: Defendant in error might decide to have, maintain and use a spur or siding and leave loaded cars of logs thereon. Logs are not loaded into box cars but upon flat trucks. There is, and necessarily must be, much danger of logs falling off. Here is a risk which should not in any event be imposed upon us, or our land be burdened therewith.

Logging operations by railroads are dangerous to life and limb. The operations of logging railroads are covered by the Workmen's Compensation Statute of Washington and classed among the extra hazardous occupations by the express recitals and provisions of the Act.

Session Laws of Wash., 1911—346, Sec. 2.

These dangers are perhaps greater in log loading and unloading operations than in the passage of train-loads of logs. As owners in fee of the lands, we are entitled to improve the same; to erect houses thereon; to use them for any lawful purpose. If, against our will, the Logging Company can carry its logs over our lands and impose on us the attendant dangers, it should not be allowed to further burden us with the dangers from storage of cars of logs and the maintenance of spurs and switches. Such may be proper when based on contract, but not otherwise. The order and decree of condemnation broadly permits the Logging Company to determine what uses, and what structures and improvements are proper or necessary.

In the petition to condemn and in the evidence

there is no allusion whatever to spurs, switches, sidings or other improvements proper or necessary.

Nor is the order and decree of condemnation supported by any finding as to "spurs, switches, sidings or other improvements proper or necessary".

We are not dealing with a common carrier railroad, but with a private way of necessity logging railroad. In any event, the necessity is the measure, limit, foundation and definition of the right to condemn. Thus, there would be no right to maintain on the fifty-foot strip a log landing or log rollway for loading or unloading. Such might be "proper" but not "necessary". Nor could the Logging Company, under the Statute and Constitution (although it could under the order and decree of condemnation), use the right-of-way to store logs or leave them on spurs. Assuming for the moment that a private way of necessity is capable of constitutional justification when procured under the eminent domain power, the supposed right is for carriage, not storage; for transit, not holding of timber products.

The improvements are entirely within the discretion of defendant in error; these improvements might consist of buildings, warehouses, a place to load or unload logs or other timber products.

Not only is the order and decree of condemnation beyond the issues stated in the petition, but the record is destitute of any evidence whereon to base said order and decree. Moreover, it is broader than the statute under which the taking is sought to be justified. For the statute only undertakes to provide for private ways of necessity. The taking is also broader than the State Constitution, which, upon this subject, only provides for taking for private use of private ways of necessity. The Constitution and Statute provides for private ways of necessity; the decree of condemnation authorizes an additional taking of property for "proper or

necessary spurs, switches, sidings or other improvements proper or necessary."

Our Objections to the Taking.

By demurrer (transcript record, 5) each of these plaintiffs in error demurred:

> "Because *this proceeding*, and the *statute under which this proceeding is waged*, to-wit: Chapter 133 of the Session Laws of 1913 of the State of Washington are contrary to, and in violation of, the Constitution of the State of Washington, and of the United States."

By answer (transcript record, 7) each plaintiff in error set up:

> "That by *this proceeding* the petitioner seeks to take the property of this defendant without due process of law, and in violation of the Constitution of the United States, and the constitution of the State of Washington. That said attempted taking of the private property of this defendant is for the private use of the petitioner, and not for any public use, and no necessity exists therefor."

The plaintiffs in error duly excepted (transcript record, 16) to each finding of fact and also to the order and decree:

> "the respondents severally except to the find-
> "ing of fact numbered 10, and to the order and
> "decree contained therein."

By motion for non-suit, the defendants made a like objection.

> "W. H. Abel: On behalf of each of the defendants, that is, on behalf of the Grays Harbor Logging Company and W. E. Boeing, I move the dismissal of this proceeding: First, because it is an *admitted taking of private property for private purposes strictly;* contrary to the fourteenth amendment of the Federal Constitution" (136).

In the Supreme Court of Washington these plaintiffs in error urged that the statute on review should be held unconstitutional, the proceedings under review should be declared illegal and the decree and order of condemnation reversed and the proceedings dismissed.

The constitutioual objection to the *statute and to the taking* was again urged in petition for rehearing (transcript record, 163–4) and in brief in support of petition for rehearing (transcript record, 164, 5, 6).

Definition of Public Use.

It seems to be conceded by defendant in error that private property may not constitutionally be taken for private uses, because in opposition to the fourteenth amendment of the National Constitution. But it is argued that the eminent domain power may constitutionally be exercised, not merely for purposes and uses by the public, that is, use by the public, but also for private uses which advance the public welfare.

That the taking in this case is for a private purpose and private use is not to be doubted. The Logging Company has a private logging railroad at some distance from certain segregated timber lands owned by it. Its petition to condemn alleges that its logging is private; it makes no claim that it serves the public. The question then is whether, under the guise of being beneficial to the public, and promoting the welfare of the State, the taking in this case is justifiable.

No issue of public welfare is presented in the petition; there was no evidence thereon nor any finding. If the basis of the right to condemn is the fact that the particular taking for private use will serve public ends and promote public welfare an issue thereon should have been presented and sup-

ported by testimony and decided by the Court. Is the exercise of a doubtful right thus to be justified? Is it due process of law when no issue is tendered or proved or adjudicated upon that which, under all the authorities, is the ultimate and only foundation for the supposed right?

The State Constitution does not say that the taking of private property for private ways of necessity is a public use. Its language is:

> "*Private property shall not be taken for private use except for private ways of necessity.*"

The necessary inference is that the taking is for a private use. Also, the statute on which the proceeding is based makes no reference to public uses.

The Mountain Timber Co. case, 77 Wash. 585, was decided on demurrer, and while the Court said that the statute as construed by it promoted the public welfare in that it prevented the resources of the State from being bottled up, that holding should not be applied where the circumstances of the taking are different, as in case at bar. That a holding in one case, that a private taking promotes the public welfare, does not sustain a *taking where there is no evidence and no finding* that the public welfare will be promoted thereby.

Prima facie only private ends are served by a taking for private uses, and in the absence of *allegation, proof and judgment* of public welfare or public use, no presumption of constitutional validity should protect the taking.

This leads to a consideration of the cases decided by this Court on which defendant in error relies. We consider that these decisions are broadly and plainly distinguishable from the instant case. In said cases either the State Constitution or the State Statute expressly declared that the taking was for

a public use, or an issue of fact of public use was tendered, proven and decided, and was the expressed foundation for the taking.

The Utah Statute upheld in *Clark* v. *Nash*, 190 U. S. 361, and in *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, declared the uses for which condemnation in those cases was permitted, in the following language:

> "Subject to the provisions of this chapter, *the right of eminent domain may be exercised in behalf of the following public uses:*
>
> "5. Reservoirs, dams, water gates, canals, ditches, flues, tunnels, aqueducts and pipes for supplying persons, mines, smelters or other works for the reduction of ores with water for domestic or other uses or for irrigating purposes or for draining or reclaiming lands or for floating logs and lumber on streams not navigable."
>
> "6. Roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores" (Utah Compiled Laws, Sec. 3588).

In *Clark* v. *Nash* (*supra*), the State Court made specific findings that the use to which the plaintiffs intended to make of the ditch for irrigation purposes

> "is under the laws of this State *declared to be, and the same is a public use,*"

and that

> "the same can and will be put to *a beneficial* and *public use* in the irrigation of the soil on plaintiff's said land, hereinbefore described" (*Clark* v. *Nash*, 198 U. S. 363).

In the instant case there is no law declaring the private way a public use; there was no averment, no issue tendered and no finding made on the subject by the Court. In *Clark* v. *Nash* (*supra*) there

was a legislative declaration and a judicial finding of public use.

In *Strickley* v. *Highland Boy Mining Company* (*supra*) the same Utah Statute was applied to uphold condemnation of an aerial bucket line to transport ore from a mine. There, also, was a judicial declaration that the use was public, as the Supreme Court of Utah said:

> "We are, therefore, of the opinion *and so hold* that the construction and operation of roads and tramways for the development and working of mines *is a public use*" (*Highland Boy Mining Co.* v. *Strickley*, 78 Pac. 296).

This Court, in *Offield* v. *N. Y., N. H. & H. R. Co.*, 203 U. S. 372, applied a Connecticut Statute which empowered any railroad having acquired more than three-fourths of the capital stock of any steamboat, ferry, bridge, wharf or railroad corporation to condemn the outstanding stock

> "upon a *finding* by a judge of the Superior Court that such purchase will be for the *public interest*" (*supra*, 376).

This Court sustained the condemnation of outstanding stock, saying, at pages 377-8:

> "The ultimate purpose of defendant in error in the case at bar is the improvement of the New Haven and Derby Railroad, which 'connects (we quote from the opinion of the Supreme Court of Errors), at New Haven, on the east with four, and at its western terminals with two, important railroad lines owned by plaintiff (defendant in error), and forms a link in an all-rail route between Boston and the West, which is the only one controlled by it over which goods can be transported with assured dispatch in all weathers and seasons'. In this purpose the *public has an interest and to accomplish it the Court applied the statute.* The Court observed: 'To develop this route so as best to

serve the public interest requires the laying of additional tracks on the New Haven and Derby Railroad and other extensive and very costly improvements. The lessor company has neither means nor credit whereby this can be effected on advantageous terms. The plaintiff could and will effect it, and at much less cost, if it can acquire the two outstanding shares of stock of the lessee. They are owned by the defendant, who refuses to agree on the terms of purchase."

In *Hairston* v. *Danville and Western Ry. Co.*, 208 U. S. 598, land was condemned for a spur track by a common carrier railway. The claim was made that the spur track was intended for private use, and not public use. This Court considered in detail the evidence on the subject and *held* that the spur track was *intended for public use.* The Court said:

> "This testimony describes *a use which is clearly public.* . . . The uses for which the track was desired are not the less public because the motive which dictated its erection over this particular land was to reach a private industry or because the proprietors of that industry contributed in any way to its cost."

The instant case is widely different. Here, there is no finding of public use and the order and decree of condemnation leaves the amount and extent of the taking to the discretion of defendant in error as to what is "proper" and "necessary". Besides, as to the South-west Quarter of Section 8, the Trial Court made a specific finding which shows that as to that Quarter there is no necessity whatever.

Union Lime Co. v. *Chicago and Northwestern Ry. Co.*, 233 U. S. 211, was a condemnation proceeding by a public service railroad, based on an order of the Railway Commission of the State of Wisconsin to acquire land for a spur track. In the Trial Court there was an express finding of public

use, and this finding was adopted by the State Supreme Court. *Chicago and Northwestern Ry. Co.* v. *Union Lime Co.*, 152 Wis. 636. This Court, after examining the statutes and facts in the particular case, agreed with this conclusion, and said, at page 222:

> "The branch or spur comes into existence *as a public utility* and as such is always available as localities change and communities grow. The Supreme Court of Wisconsin has left no doubt with respect to the *public obligations* imposed upon the carrier in relation to the spurs and branches to be provided under the statute in question, and we find no ground for the conclusion that this enactment was beyond the state power."

It is significant, also, that the defendant in error has no public obligations such as attend common carriers. It would have the rights of a common carrier without the corresponding obligations. And, as was said by this Court in the Hairston case:

> "There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings" (*supra*, 208 U. S. 608; *Tap Line Cases*, 234 U. S. 25).

Mt. Vernon Cotton Co. v. *Alabama Power Co.*, 240 U. S. 30, decided that a corporation organized under the statutes of the State of Alabama to manufacture, supply and sell to the public, power produced by water as a motive force, was a public use. The statute was set out at length and considered in the State Supreme Court.

> *Alabama Power Co.* v. *Mt. Vernon Cotton Co.*, 186 Ala. 637.

The use was clearly public and was so decided by the State Courts, following the State Statute to the same effect.

The Supreme Court of Washington sustained the constitutionality of the State Statute in question upon the authority of *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9. The Statute of New Hampshire there sustained was a public use statute. The petition to condemn alleged:

> "That the construction of the mill and dams to raise the water for working the mills, for creating a reservoir of water and for equalizing its flow was a public use and benefit to the people of the State and necessary for the use of the mills for which it was designed;"

and the prayer prayed:

> "that it might be determined whether the construction of the mills and dams . . . were or might be of public use and benefit."

O'Neill v. *Leamer*, 239 U. S. 244, sustains a taking for a drainage district organized as a public corporation under the State law. The point was made that the taking was for a private purpose, contrary to the fourteenth amendment. In a previous case, the Supreme Court of Nebraska held that the districts contemplated by the Act were purely public and administrative; its officers are chosen by popular election and their powers and duties prescribed by statute. The State Supreme Court also held that the reclamation by drainage of waste lands was a matter of *general public concern*, and this Court sustained that view. It may be urged that the taking in said case is sustainable as an exercise of the police power.

In *Otis Co.* v. *Ludlow Co.*, 201 U. S. 140, the Court sustained a taking for the erection of a dam under the Massachusetts Mill Act. Some of these Mill Acts antedated the Federal constitution. The Court said:

> "Such acts have been in force in Massachusetts ever since an act of 1714, c. 15, 1 Prov.

> Laws, 729. The practice sanctioned by them would seem from the recitals of that act to have been still older. It may have begun with grist mills and may have had its justification in the public needs which exempted from military watchings and warnings one miller to each grist mill; act of 1693, c. 3, Sec. 13; 1 Prov. Laws 130; and in the public duties which were expressed in the act of 1728, c. 6, Sec. 3; 2 Prov. Laws, 497. But at all events, the liability of streams to this kind of appropriation and use has become so familiar a conception in New England, where water power plays as large a a part as mines in Utah, that it would not be very extravagant to say that it enters as an incident into the *nature of property in streams* as there understood."

Property in streams is different from private property in land.

The Southwest Quarter of Section 8.

In our main brief we have shown that the trial court held that there was no necessity for condemnation for right of way to remove the timber thereon, viewing the same as a separate tract (which it was). The Supreme Court on this subject said that there was an adequate way at this time. That way is the Wishkah River.

It is a navigable highway.

U. S. v. *Wishkah Boom Co.*, 136 Fed. 42.

A boom and driving company is a public service corporation.

East Hoquiam Boom & Logging Co. v. *Nelson*, 20 Wash. 142.

The tolls charged by a boom and driving company must be reasonable, and are subject to regulation by the courts.

Wishkah Boom Co. v. *Greenwood Timber Co.*, 88 Wash. 568.

A right of way of necessity by common law is never employed because convenient; it must be clearly necessary.

Jones, Easements, Secs. 315, 317.

So where land can be reached by the sea, no way of necessity at common law exists.

Jones, Easements, Sec. 320.

Kingsley, 86 Maine, 279.

The same applies where there is a navigable water course.

Lawton v. *Rivers*, 2 McCord (S. C.), 446.

State Sovereignty.

In the only case in which the Supreme Court of Washington has considered the question of the constitutionality of the state statute, *State ex rel Mountain Timber Co.* v. *Superior Court*, 77 Wash. 585, the opinion of the Court seems to be based almost, if not entirely, upon the theory that the sovereignty of the state is unrestricted upon this subject; that the state, exercising reserved and not enumerated powers, has a right practically without limit to legislate to take private property for any use, public or private.

The decisions cited in our main brief show that the definition of the eminent domain power has uniformly been the power to take private property for public uses. Authorities differ as to what is the scope to be given to the expression "public use." But we believe all authorities sustain our contention that where the taking is admittedly for private uses, it is not due process of law. In such a case it is beyond the power, authority and competency of the State. In *Watson on the Federal Constitution*, it is shown that in Turkey the Sultan was powerless

to take private property for his private purposes. The principle originated in the Roman Empire.

> "The Roman Senate—passed a decree that private property could be taken only for public use, upon an estimate being made therefor by good men. This was the origin of the principle."
>
> *2 Watson Const. of the U. S.* 1459.

> "No one can be compelled to give up his property except for the public good and for a just and previous indemnity."
>
> *Code of Napoleon*, Article 545.

The right of private property is older than constitution or statute law. It is even older than civilization. Fabre, in a number of recent notable works, has traced the recognition of private property to ants, bees and spiders. The dog that buries his bone for a future meal, does it in virtue of the private property instinct.

The right of private property is not created by statutes nor constitutions. One of the fundamental purposes of constitutions is to safeguard the rights of property. There is no unrestricted right of sovereignty in any civilized land to take private property for uses admittedly private. This is so well understood that the question has seldom been presented, but in numerous decisions the principle we contend for has been stated. Thus, in *Opinion of Justices*, 204 Mass. 607, it is said:

> "The exercise of the power of the state, either through taxation or eminent domain, to take the land of one person with the intent of handing it over to another person is not a public purpose, *and is contrary to basic and social principles of free government.*"

Thus it was said in *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239:

> "It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accomplished by compensation to the owner. That principle arose out of the social nature of all free governments. The taking of private property for the private use of another is not due process of law and is a violation of the fourteenth article of the Amendments to the American Constitution."
>
> *Chicago, B. & Q. Co.* v. *Chicago*, 166 U. S. 226.

> "The right to property being inviolable and sacred no one ought to be deprived of it except in cases of evident public necessity legally ascertained and on condition of a previous just indemnity."
>
> *Guthrie, The Fourteenth Amendment*, 89.

It has been, and will be, argued that the taking in this case is justified because for the public welfare of the State of Washington. We have shown that no such issue was presented nor decided. How can the welfare of the State of Washington be affected by the route through which the timber on the southwest quarter of Section 8 is transported to market, whether down a navigable river or by a private logging railroad?

If defendant in error so desired, it could incorporate under the Toll logging road statute, in which event it could convey its timber to market, but would be obligated to act as a common carrier and transport all timber products offered it along its logging road. There would then be obligations as well as rights resting upon it. And other *private* timber holdings along its railroad would not then be bottled up.

The statute we attack is monopolistic; it is out of line with the modern tendency to regulate carriers. As a private logging road it can refuse to transport timber products of others tributary to its road, and if such other owners do not have other means of transportation, and from inclination, lack of means, or commercial feasibility, cannot build a railroad for themselves, they are at the mercy of the private logging railroad serving that territory.

The defendants in error have a private logging road; it has no obligations, save to transport the products of the particular lands over which it condemns a right of way; as to *other* lands it has no duties. Certainly this is a fair argument that the taking in this case serves no public end nor welfare. But, as above stated, no issue of public use or public welfare was tendered, proved or adjudicated in this case.

Again, why should the defendant in error be permitted to use the right of way for purposes *necessary and proper?* The question of necessity should be determined by the Court and not by the defendant in error.

Tracy v. *Elizabethtown, etc., R. R. Co.*, 80 Kentucky, 259.

The state Supreme Court appears to justify the taking of our property because the defandant in error has a private enterprise—a logging railroad. But the right to condemn for private enterprises is generally denied.

2 Lewis Eminent Domain, Sec. 961-*a*.

Weidenfeld v. *Sugar Run R. Co.*, 48 Fed. 615.

Edgewood Co.'s Appeal, 79 Pa. St. 257.

"It is an ancient principle which entered into "our social compact that the use for which pri- "vate property may be taken must be a public

"one; whether the taking be by the exercise of
"the right of eminent domain or that of taxa-
"tion. The sovereign power is incapable of
"conferring any right to interfere with private
"property, except it be for needed objects. To
"take land for any other than a public use,
"even for full compensation, would be to
"violate the contract by which the land was
"originally granted by the government."

Matter of Tuthill, 163 N. Y. 138.

It cannot justly be said that the mere passage of the private way of necessity statute establishes a public policy in the State of Washington, which in effect makes a taking for private logging roads a public use or public welfare. That course of reasoning would sustain any arbitrary statute. It is equivalent to saying, "You shall not pass a law unless you choose to do it."

Taylor v. *Porter*, 4 Hill. 140;
2 Story, Constitution, 5th Ed. 693.

"Under the police power, rights of property
"are impaired not because they become useful
"or necessary to the public, or because some
"public advantage can be gained by disregard-
"ing them, but because their free exercise is
"believed to be detrimental to the public inter-
"ests. Property is taken by the eminent domain
"power because useful to the public; and under
"the police power because harmful."

Freund, Police Power, Sec. 511.

Private Ways.

In the following cases private way of necessity statutes have been declared unconstitutional by state courts:

Osborn v. *Hart*, 24 Wis. 89;
Witham v. *Osburn*, 4 Ore. 319;
Bauderot v. *Murphy*, 30 S. E. 825 S. C.
Varner v. *Martin*, 21 W. Va. 534.

In addition to the authorities cited in our main brief, we also cite on this point

Mills, Eminent Domain, 2d Ed., Sec. 29;
Nichols, Eminent Domain, Sec. 205—Sec. 221.

The condition of the State of Oregon west of the mountains is substantially like that of the State of Washington west of the mountains. Recently the Supreme Court of Oregon has held that a private logging railroad is without power to condemn a right of way over which to remove its timber, holding Lord's Oregon Laws, Sec. 6307, to be unconstitutional because a taking of private property for private use.

Anderson v. *Smith-Powers Logging Co.*, 139 Pac. 736.

A private railroad tramway for mining purposes is not a private way of necessity and cannot be acquired by condemnation proceedings.

People ex rel. v. *District Court*, 11 Col. 155.

In Georgia, where the constitution provides for condemnation of private ways of necessity, it has been decided that one who owns a sawmill and is engaged in preparing lumber for market, is engaged in a business in which the public is in no way interested; that it is purely a private enterprise. There the scope of the constitution is narrowed by statute.

Garbutt Lumber Co. v. *Georgia Ry.*, 111 Ga. 714.

Also in Georgia a mere convenience is not sufficient to warrant condemnation.

Gaines v. *Lumsford*, 120 Ga. 370.

In Michigan, which has a private way of necessity constitution, spurs for private purposes cannot be obtained by eminent domain proceedings.

Pere Marquette Ry. Co. v. *U. S. Gypsum Co.*, 154 Mich. 290.

An excellent note upon the unconstitutionality of private ways is found in 6 American Law Review, 350.

Summary.

Finally, our contention is that our property is being taken for a strictly private use, and that no issue was tendered or decided of public welfare or of public use; that even under the decisions, which give a broad meaning to the term "public use" so as to include public welfare or public benefit, the evidence must justify and the Court find the fact of public welfare to exist, or find a public use as an element, fact or conclusion before the taking is to be justified. The cases decided by this Court show a close inspection in each instance of the evidence to determine whether the use was or was not public; and in said cases this Court noted that by statute or judgment, usually by both, the use had been determined to be a public one.

The question is now presented whether, where petition alleges, evidence shows and judgment finds that the use is in fact private, and is silent on the subject of public use, or public welfare, and the findings show, as to part, a lack of necessity, and as to all, a taking for "necessary or proper" purposes, it is nevertheless due process, and under the protection of the Fourteenth Amendment.

Respectfully submitted,

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Attorney for Plaintiffs in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916

No. 132.

THE STATE OF WASHINGTON ex rel. GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Plaintiffs in Error,

vs.

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CHEHALIS COUNTY and COATS-FORDNEY LOGGING COMPANY, Defendants in Error.

In Error to the Supreme Court of the State of Washington.

BRIEF OF DEFENDANTS IN ERROR

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In the Supreme Court of the United States

OCTOBER TERM, 1915

No. 471.

THE STATE OF WASHINGTON ex rel, GRAYS HARBOR LOGGING COMPANY and W. E. BOEING, Plaintiffs in Error,

vs.

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CHEHALIS COUNTY and COATS-FORDNEY LOGGING COMPANY, Defendants in Error.

STATEMENT OF THE CASE.

The Coats-Fordney Logging Company is a private corporation organized and existing under the laws of the State of Washington, and its chief business is to own timber and timber lands and to log such timber and transport the same to market on Grays Harbor. It hauls its saw-logs by means of a private logging railroad. Its logging railroad is now several miles in length and its present northern terminus in the woods is near the southerly line of the northwest quarter of Section 32, in Township 19, North of Range 8, West of the Willamette Meridian. The plaintiffs in error are the owners

of said northwest quarter of Section 32. The Coats-Fordney Logging Co., defendant in error, owns the lands of and the timber on Sections 20 and 30 and the southwest quarter of Section 10 and the southwest quarter of Section 8, in said township and range, which is to the north of the lands owned by the plaintiffs in error, and in order to bring its timber above mentioned to market it is necessary that the logging road of the Coats-Fordney Logging Company be extended through the quarter section of land so owned by the plaintiffs in error. For the purpose of obtaining the right of way for its logging railroad, through the lands of plaintiffs in error, the Coats-Fordney Logging Company brought suit in the Superior Court of the State of Washington, for Chehalis County, for the condemnation and appropriation of such right of way. Its action was brought under and by virtue of a statute of the State of Washington enacted in 1913, being 1913 Session Laws of the State of Washington, page 412, which Statute is hereinafter set out in full.

The petition for condemnation alleged, in addition to the facts hereinbefore set forth, that it was necessary for the proper use and enjoyment of the lands owned by the petitioner, to have and maintain a private way of necessity across the lands owned by the plaintiffs in error,

for the purpose of constructing its logging railroad thereupon, in order to remove its timber and bring it to market, and that the petitioner had no other available or reasonably practical route whereby it could reach its timber and bring it to market.

After a hearing the lower court granted to the Coats-Fordney Company the right to condemn and appropriate such right of way, and ordered the cause set for trial before a jury, to determine the damages to be paid. In its order of condemnation the court found that it was necessary for the proper use and enjoyment of the lands of the said Coats-Fordney Company and for the removal of the timber therefrom, that it should have a private way of necessity over the quarter section of land owned by the plaintiffs in error, for the purpose of removing the timber on its said lands, and that the Coats-Fordney Logging Company had no other availably or reasonably practical route by means of which it could reach its said timber lands with its logging road, and that in order to remove its timber and bring it to market it was necessary to cross over the lands of the plaintiffs in error. The findings and decree of the court are sufficiently set out at pages 6, 7, 8 and 9, brief of plaintiffs in error.

Thereafter the plaintiffs in error removed

the case to the Supreme Court of the State of Washington, on a writ of certiorari, where the case was fully considered, and the Supreme Court affirmed the order of condemnation and held that the statute above mentioned was not in violation of the constitution of the State of Washington or of any provision of the constitution of the United States.

Throughout the proceedings the plaintiffs in error have contended that the legislative act above mentioned was in violation of the constitution of the State of Washington and also in violation of the 14th amendment to the federal constitution, and that in any event the testimony failed to show that the right of way sought to be acquired by the Coats-Fordney Logging Company was a necessary right of way as provided by the statute.

The legislative act, by virtue of which such right of way is sought, is as follows:

"RELATING TO PRIVATE WAYS OF NECESSITY.

AN ACT relating to the taking of private property for private ways of necessity and for drains, flumes and ditches on or across the lands of others for agricultural, domestic or sanitary purposes.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. An owner, or one entitled to

the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct and maintain any drain, flume or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be. The term "private way of necessity," as used in this act, shall mean and include a right of way on, across, over or through the lands of another for means of ingress and egress,and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, mineral or other valuable materials and products may be transported and carried.

Sec. 2. The procedure for the condemnation of land for a private way of necessity or for drains, flumes or ditches under the provisions of this act shall be the same as that provided for the condemnation of private property by railroad companies, but no private property shall be taken or damaged until the compensation to be made therefor shall have been ascertained and paid as provided in the case of condemnation by railroad companies.

Sec. 3. That any person or corporation availing themselves of the provisions of this act for the purpose of acquiring a right-of-

way for a logging road, as a condition precedent, contract and agree to carry and convey over such roads to either termini thereof any of the timber or other produce of the lands through which such right is acquired at any and all times, so long as said road is maintained and operated, and at reasonable prices; and a failure so to do shall terminate such right-of-way. The reasonableness of the rate shall be subject to determination by the public service commission."

Section 16 or Article 1 of the Constitution of the State of Washington, is as follows:

"EMINENT DOMAIN.—Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really

public shall be a judicial question and determined as such, without regard to any legislative assertion that the use is public."

ARGUMENT AND AUTHORITIES.

As we understand them, the plaintiffs in error in their brief in this court, claim that the "way of necessity" law of the State of Washington is in violation of the 14th amendment to the federal constitution, and that for like reasons the "way of necessity" clause of the constitution of the State of Washington violates the 14th amendment, and that in any event the right of way which the lower courts have given the defendant in error is not, under the evidence in the case, such a way of necessity as is contemplated by the constitution of the State of Washington.

1.

WHAT QUESTIONS THE FEDERAL SUPREME COURT WILL REVIEW.

We believe the following propositions, as applied to this court, are elementary or nearly so:

That the decision of the highest state court on the question whether or not a state statute is in violation of the state constitution is binding on this court and the question will not be reviewed by this court.

Rasmussen vs. Idaho, 181 U. S., 198; 45 Law Ed., 820.
Mo. Pac. Ry. Co. vs. Humes, 115 U. S., 512; 29 Law Ed., 463.
The Montana Co. vs. The St. Louis Mining & Milling Co., 152 U. S., 160; 38 Law Ed., 398.
Hart vs. Lamphire, 3 Pet., 280; 7 Law Ed., 679.
Mont. ex rel Haire vs. Rice, 204 U. S., 291; 51 Law Ed., 490.

The construction given by the highest state court to the constitution of that state is conclusive on the federal Supreme Court in determining its validity under the federal constitution.

Manley vs. Park, 187 U. S., 547; 47 Law Ed., 296.
Tampa Water Works vs. Tampa, 199 U. S., 241; 50 Law Ed., 170.
Gatewood vs. N. Carolina, 203 U. S., 531; 51 Law Ed., 305.
Louisville etc. R. Co. vs. Kentucky, 183 U. S., 503; 46 Law Ed., 298.

Whether the provisions of a state statute are consistent with the state constitution is not a federal question.

Medberry vs. Ohio, 24 How. 413; 16 Law Ed., 739.
Levy vs. San Francisco, etc., 167 U. S., 175; 42 Law Ed., 126.
Kipley vs. State of Ill. ex rel Akin, 170 U. S., 181; 42 Law Ed., 998.

The Supreme Court of the United States in the review of actions from state courts will adopt the findings of fact made by the state courts and consider them as conclusive on the federal Supreme Court.

Hedrick vs. Atchison etc. R. Co., 167 U. S., 673; 42 Law Ed., 320.
Keokuk & H. Bridge Co. vs. Ill., 175 U. S., 626; 44 Law Ed., 299.
Gardner vs. Bonestell, 180 U. S., 362; 45 Law Ed., 574.
Chapman & D. Land Co. vs. Bigelow, 206 U. S., 41; 51 Law Ed., 953.

Under the foregoing decisions out of this court and many others which might be cited, it would seem thoroughly settled that this court in a case removed from the state Supreme Court, will not review the question as to whether a state law violates a state constitution; that it will not review any of the facts which were determined by the state court, except, probably, insofar as it is necessary so to do in order to determine whether or not the state statute or constitution violates any provision of the federal constitution; that it will accept as conclusive, the construction placed by the state court on any statute of the state or on any provision of the state constitution, and this court will only consider whether or not such state statute or constitution, as construed by the highest

court of the state, violates any provision of the federal constitution.

II.

DOES THE PRIVATE WAY OF NECESSITY STATUTE OF THE STATE OF WASHINGTON VIOLATE THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION?

The only question, or at least the only question of any moment, involved in this case, which will be reviewed by this court, is whether or not the state statute in question and the state constitutional provision hereinbefore quoted are in violation of the 14th amendment to the federal constitution.

All authorities agree that the power of eminent domain is an attribute of and rests in the sovereign state.

As is said by Mr. Cooley in his work on Constitutional Limitations, 7th Ed., page 754:

> "It is the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience or welfare may demand. * * * As under the peculiar American system the protection and regulation of private rights, privileges and immunities in general belong to the state governments, and those governments are ex-

> pected to make provision for the conveniences and necessities which are usually provided for their citizens through the exercise of the right of eminent domain, the right itself, it would seem, must pertain to those governments also, rather than to the government of the nation."

The states have never released or undertaken to release to the federal governmnt any of this sovereign power. The federal constitution does not undertake to say under what circumstances a state may and under what circumstances it may not take private property. The provision of the federal constitution with reference to the exercise of the power of eminent domain has been by this court always held to apply only to the federal government and not to the states. Aside from the limitations which may be contained in its own constitution, the state is limited in its power of eminent domain only by the undefinable but well known laws and rules which are fundamental in every civilized country and upon which every government is founded, and the Supreme Court of the United States is by the 14th amendment to the federal constitution given the power, not to say what is a public use or when a state may and when it may not take private property, but to stay the hand of the state when it manifestly abuses its sovereign power of eminent domain

or any other power which it may possess. By the 14th amendment to the federal constitution the Supreme Court may, acting as a great arbitrator, stay the actions of the state when the state is over-leaping the bounds of fair dealing and violating the fundamental laws of government. It is not therefore for this court to say what is public use; that power rests exclusively in the state and its agencies and only the abuse of that power will be corrected by this court, and manifestly this court will not say that the highest court of a state is permitting the state to abuse its power of eminent domain, unless and until it appear that the threatened action of the state would undermine fundamental rights and is a shock to the sense of justice. As we read the many decisions of this court, it is in substance held that, it is the exclusive right and privilege of the highest state court to declare whether the needs of, and the benefits to, the public in a given case, are sufficient to authorize the taking of private property and it is for this court to say whether, under all the circumstances and having due regard to the opinions of the state court, the latter has permitted the state to abuse its power.

At the time of writing this brief the plaintiffs in error have not completed their brief in this court but their attorneys have kindly per-

mitted us to read portions of their unfinished brief and have informed us in a general way as to what will be the contents thereof when completed.

We understand that plaintiffs in error will take the position that the taking by the Coats-Fordney Logging Co. is for a strictly private use and that practically the only question involved here is whether or not the power of eminent domain may lawfully be exercised to take private property for a strictly private use.

If by the words "strictly private use" counsel for plaintiffs in error mean to elininate or exclude any idea of public benefit or welfare, then we cannot agree that they have properly stated the question before this court. It seems to us that the question involved can be more correctly stated as follows: May private property be taken by a private corporation for its exclusive use when it is decided by the highest courts of the state that such taking will be for the material advancement of the resources of the state and the welfare of the people?

The brief of plaintiffs in error will cite a great many authorities in support of the argument that eminent domain does not include the taking of private property except for a public use, and that no state or federal constitutional provision could grant such power; that the fun-

damental idea of eminent domain is the taking of private property for a public use only. There are some very high authorities, however, which hold that the power of the Legislature to enact laws is unlimited, except by the state or federal constitution, and it might be argued with some plausibility, that if there were no state or federal constitutional provision limiting the exercise of the power of eminent domain, a state might authorize the taking of private property for a strictly private use and for a use in which the public has no interest and from which it will receive no appreciable advantage. That question, however, would be purely academic, because there are state and federal constitutional limitations to the exercise of the power of eminent domain.

Practically all of the authorities cited or to be cited by plaintiffs in error are general in their character and sustain the postion that private property may be taken only for a public use.

This court, speaking with the federal constitution in mind, has in several cases so held.

In the case of Hairston vs. Danville & W. R. Co., 208 U. S., 598; 52 Law Ed., 637, this court said:

> "We assume that, if the condemnation was for private uses, it is forbidden by the 14th Amendment."

In the case of Mo. Pac. Ry Co. vs. Nebraska, 164 U. S., 403; 41 Law Ed., 489, this court said:

> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States."

In the case of Fallbrook Irrigation Dist. vs. Bradley, 164 U. S., 112; 41 Law Ed., 369, this court said:

> "The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation."

To the same effect see the following cases out of this court:

Madisonville Traction Co. vs. St. Bernard Min. Co., 196 U. S., 239; 49 Law Ed., 462.

Clark vs. Nash, 198 U. S., 361; 49 Law Ed., 1085.

Strickley vs. Highland Boy Gold Min. Co., 200 U. S., 527; 50 Law Ed., 581.

We have, therefore, no hesitancy in conceding the correctness of the general proposition that private property may be taken by the power of eminent domain only for a public use, and consequently concede the correctness of the doctrines announced in the many authorities to

be cited in the brief of plaintiffs in error in support of that proposition.

These concessions bring us at once to a discussion of the vital question as to what is the meaning of the words "public use" contained in the constitution.

(A) MEANING OF PUBLIC USE.

The courts have not been able to agree as to what is meant by the phrase "public use," nor have any of them really undertaken to give a fixed and definite definition of those words. Generally speaking, however, there are two different constructions given to the phrase "public use." On the one hand, there is a long line of authorities which hold that the words "public use" found in the constitutions should be strictly construed and that they mean and are synonymous with "use by the public." On the other hand, there is an equally long line of decisions to the effect that the term "public use" as used in the constitutions should be liberally construed with the view of advancing the material interests of the state and the welfare of the people and are synonymous with the idea of public advantage and public welfare.

At Section 164, Vol. 1, Lewis on Eminent Domain, 2nd Ed., it is said:

> "The different views which have been taken of the words 'public use' resolve them-

selves into two classes: one holding that there must be a use or right of use on the part of the public or some limited portion of it, the other holding that they are equivalent to public benefit, utility or advantage."

At pages 24 and 25, 10 Ruling Case Law, speaking with reference to the meaning of the words "public use," it is said:

> "One line of decisions holds that 'public use' means 'use by the public' that is public employment, and consequently, to make a use public, a duty must devolve on the person or corporation holding property appropriated by right of eminent domain to furnish the public with the use indicated, and the public must be entitled, as of right, to use or enjoy the property taken. The opposite view is that 'public use' means 'public advantage,' and that anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources or the employment of capital and labor, contributes to the general welfare and the prosperity of the whole community and giving the constitution a comprehensive interpretation, constitutes a public use."

Roughly speaking, it may be stated that the courts of the following states have given a broad construction to the term "public use" and have held with the last line of cases above mentioned,

to-wit: Alabama, Colorado, Connecticut, Idaho, Montana, Pennsylvania, Utah, Minnesota, W. Virginia, Maine, California, New Hampshire, Georgia, Arizona and Nevada, and the Supreme Court of the United States has approved of such construction whenever the highest state court has adopted it.

Further along in this brief we will discuss the decisions of the State of Washington on this question.

In Olmstead vs. Camp, 33 Conn., 532, the court said:

> "Public use may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain, for purposes of great advantage to the community, is a taking for public use."

In the case of Minnesota Canal & Power Co. vs. Koochiching Co., 107 N. W. (Minn.) 405-411, the court said:

> "The qestion of the general public benefit is necessarily also involved. * * *. In this state the court is required to determine whether the proposed public use of the property will be for the public benefit. There is no doubt but that this conception of benefit and public utility and the general welfare of the state is involved in all cases of this character. In some cases public

benefit, instead of public use, is made the test. It has been thought that any instrumentality which tends to promote the public good, such as manufacturing establishments which furnish labor for mechanics, develop and utilize natural advantages, and to create new markets for the products of the community, are of such great public benefit as to justify the state in taking private property in their aid. But such indirect advantages to the general public do not justify the exercise of the power of eminent domain. The contrary theory has, it is true, entered largely into the decisions which have sustained the constitutionality of the various mill-dam, drainage, mining, and irrigation statutes which have been enacted in certain states."

In the case of Brown vs. Gerard, 100 Me., 351; 70 L. R. A., 472, the court said:

"Public benefit is, however, one of the essential characteristics of a public use. There is no doubt that the conception of public benefit and public utility, and the general welfare of the state, even indirectly promoted, has had much to do in tempering the opinions of the courts. The term is a flexible one, and necessarily has been of constant growth, as new public uses have developed. * * * It is beyond question that any instrumentality which tends to promote the manufacturing industries of a state, to furnish labor for its mechanics, to create the need of markets for its products, and to develop and utilize its natural advantages, is of great public benefit."

In the case of Tanner vs. Treasury Tunnel Min. Co., 35 Col., 593; 83 Pac., 464, it was held that in determining whether or not a use is public, the physical conditions of a country, the needs of the community, the character of the benefit which a projected improvement may confer upon a locality and the necessity for such improvement in developing the resources of a state, are to be considerd.

In Butte etc., R. Co. vs. Montana Union R. Co., 16 Mont., 504; 41 Pac., 232, it was held that a state, in view of its natural advantages, resources and necessities, may legislate in such a way, exercising the power of eminent domain, as that its advantages and resources shall receive the fullest development for the general welfare, the laws being general in their operation.

To the same effect see the following cases in states from whose decisions quotations have not been made. Many might be cited, but we are content to cite but one case from each state.

Aldrige vs. Tuscumbia R. Co., 2 Stew. & P. (Ala.) 199; 23 Am. Dec., 307.

Jacobs vs. Clearview Water Supply Co., 220 Pa. St., 388; 21 L. R. A. (N. S.) 410.

Caretta R. Co. vs. Coal Co., 57 S. E. (W. Vir.) 401.

Los Angeles County vs. Reyes, 32 Pac. (Cal.) 233.

Nash vs. Clark, 27 Utah, 158; 75 Pac., 371.
Billings Sugar Co. vs. Fish, 106 Pac. (Mont.), 565.
Ortiz vs. Hansen, 83 Pac. (Colo.) 964.
Jones vs. Venable, 120 Ga., 1.
Latah County vs. Peterson, 16 L. R. A. (Idaho), 81.
Inspiration Consol. Copper Co. vs. New Keystone Copper Co., 144 Pac. (Ariz.) 277.
Grover Irrigation Co. vs. Ditch Co., 131 Pac. (Wyo.) 43.
Goldfield Consol. Mill Co. vs. Annex Gold Min. Co., 150 Pac. (Nev.) 313.

In the case of Strickley vs. Highland Boy Gold Min. Co., 50 Law Ed. (U. S.) 581, this court, speaking with reference to its decision in the case of Clark vs. Nash, 198 U. S., 361, said:

> "That case established the constitutionality of the Utah statute, so far as it permitted the condemnation of land for the irrigation of other land belonging to a private person, in pursuance of the declared policy of the state. In discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test."

Wherever the highest court of a state has construed the words "public use" to be synonymous with public welfare or advantage, the Supreme Court of the United States has followed the decision of the state court and has held that a taking for a public use includes a use which

will advance the public welfare and the resources of the state. For the present we will do nothing more than cite these cases We will refer more particularly to them further on in this brief.

Fallbrook Irrigation Dist. vs. Bradley, 164 U. S., 112; 41 Law Ed., 369.
Clark vs. Nash, 198 U. S., 361; 49 Law Ed., 1085.
Strickley vs. Highland Boy Gold Min. Co., 200 U. S., 527; 50 Law Ed., 581.
Offield vs. N. Y. etc. R. Co., 203 U. S., 372; 51 Law Ed., 231.
Hairston vs. Danville etc. R. Co., 208 U. S., 598; 52 Law Ed., 637.
Mo. Pac. Ry. Co. vs. Nebraska, 164 U. S., 403; 41 Law Ed., 489.
Union Lime Co. vs. Chicago & N. W. R. Co., 233 U. S. 211; 58 Law Ed., 924.
O'Neill vs. Leamer, 3 Current Advance Sheets U. S. Rep. 54.

(B) PUBLIC POLICY OF WASHINGTON AS INDICATED BY ITS CONSTITUTION.

What then has been and is the public policy of the State of Washington in this regard? In order to answer this question it will be necessary to look at the state constitution itself and the enactments of its legislature and the decisions of its highest court.

In our judgment it is not so much a question as to whether or not it is the policy of this state to construe the words "public use" to be synony-

mous with public benefit or advantage, as it is whether the constitution itself, as construed by the highest state court, has declared that taking for "private ways of necessity and for drains, flumes or ditches on or across the lands of others for agricultural, domestic and sanitary purposes" is a taking for a public use. It is our contention that the state constitution has in effect declared that the public interest and public welfare demanded that the people of the state should have power by means of eminent domain, to acquire private ways of necessity and for drains, etc., or, in other words, that this provision of the constitution should be construed as though it read as follows:

> "Private property shall not be taken for private use, except for private ways of necessity and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes, WHICH USES ARE HEREBY DECLARED TO BE PUBLIC USES."

To construe our constitutional provision with reference to private ways of necessity as authorizing the taking of private property for a strictly private use would be to declare that provision of the state constitution unconstitutional. Such a holding would accuse the constitutional convention of being entirely ignorant of the federal constitution. It would accuse the

many eminent constitutional lawyers who sat in that convention, and who before and since have graced and honored the profession throughout the Pacific Northwest, of base ignorance of the law. If this provision of the constitution can by any reasonable construction be held not to violate the federal constitution, this court will, out of respect for the sanctity of the state constitution and the intelligence and learning of those who wrote it and the people who adopted it so construe it.

This provision of the constitution with reference to private ways of necessity is linked with ways "for drains, flumes and ditches for agricultural, domestic and sanitary purposes," and if the constitution means that private ways of necessity may be taken for strictly private use, it must also mean that ditches and canals for the purpose of carrying water to irrigate is also for a strictly private use, and yet all the courts of states where there is irrigation have held that rights of way taken for irrigation purposes were for a public use, and these decisions were made without the aid of such constitutional provisions as are contained in our constitution.

But it is not necessary that we or this court in this case construe this provision of the constitution, because the Supreme Court of the

State of Washington has already construed it in very clear and concise language, in the case of State of Washington ex rel Galbraith vs. Superior Court for Spokane County, 59 Wash., 621.

The facts in that case were that the Spokane Valley Land & Water Co. owned quite an extensive tract of arid lands. It instituted this suit for the purpose of obtaining a right of way across certain privately owned land for the purpose of constructing its ditch or canal by means of which it intended to carry water for the purpose of irrigating its arid lands. The court said:

> "By far the larger part of the argument of learned counsel for the relators is based upon the fact that the company is not a public service corporation, and that it does not claim the right to condemn the land of the relators upon that ground, but claims the right only as any single private land owner may claim such right under this law. We will proceed upon the assumption that such is its claim; and that the company is under no obligation whatsoever to serve the public though we do not decide what its public service obligations are."

The statute to which the court refers is found at Sec. 6325 et seq., Rem. & Ball.'s Codes of the State of Washington. By that statute it is provided that:

> "When any person owning claims, lands or mining claims as specified in the fore-

going section, is not a riparian proprietor or being such has not sufficient frontage on said stream, lake, artificial stream, ditch or reservoir, to obtain a sufficient flow of water to irrigate his land or use on his mining claim, he shall be entitled to the right of way through the farms or tracts of lands or other mining claims which lie between him and said stream, lake, artificial stream, ditch or reservoir, or the farms, tracts of lands or mining claims, which lie above and below him on the stream, lake, artificial stream, ditch or reservoir."

The statute further provided that if such owner was unable to otherwise acquire such right of way he might take the same by condemnation.

The court further said:

"It is the law in this state, as it appears to be in many Western states having large areas of arid land capable of being reclaimed or rendered more productive by irrigation, that the test of public use in the acquiring of water rights and rights of way for canals and ditches to convey water to land for the purpose of irrigating the same, is not necessarily the service that parties seeking to acquire such rights may be compelled to render to the public in connection therewith."

The court then quotes the constitution of the State of Washington with reference to eminent domain and proceeds:

"Here is an inference so strong as to amount almost to an affirmative declaration that private property may be taken for private use when the use is confined to the purposes enumerated in this provision, one of which is ditches on or across the land of others for agricultural purposes. * * * We have quoted the constitutional provision which clearly indicates that property may be taken under the power of eminent domain for certain enumerated private uses among which are ways for ditches for agricultural purposes. While this provision in terms seems to give the power to take for private use, it was evidently adopted upon the theory that the public would be sufficiently benefited by the taking for such a purpose to warrant the taking; that is, though it be seemingly called a private use by these words of the constitution it is also in effect a public use in view of the necessity of a state like ours having vast areas of arid land. These considerations lead us to conclude that, notwithstanding our constitution has declared that the question of public use shall be a judicial one, and is to be determined without reference to legislative assertion upon the subject, such question is not to be so determined without reference to constitutional assertions upon the subject. * * * *

The benefit to the public which supports the exercise of the power of eminent domain for purposes of this character, is not to be service, but is the developmnt of the resources of the state, and the increase of its wealth generally, by which its citizens incidentally reap a benefit."

The doctrine of the Galbraith case was approved and confirmed in the case of State of Washington ex rel Gold Valley Irrigation Co. vs. Superior Court, 67 Wash., 556-563.

In the case of Sultan R. R. & Tbr. Co. vs. Great Northern Ry. Co., 58 Wash., 604-612, the court, in speaking of the constitutional provision with reference to private ways of necessity, says:

> "The constitution grants the right to take private property for private ways of necessity, and it was open to the respondent to claim that the condition then existing presented a sufficient cause for the exercise of the right."

A case which has been sometimes misquoted and is by the plaintiffs in error in their brief misapplied, is In Re Tuthill 163 N. Y., 133; 49 L. R. A., 781.

Many times in the earlier history of the State of New York the legislature had passed drainage laws authorizing the owner or owners of lands, when necessary to drain their lands, to acquire by the right of eminent domain, right of way for drainage ditches to be placed upon the lands of others. As fast as these statutes would come before the New York courts, they were by those courts held unconstitutional.

See In Re Ryers, 72 N. Y., 1; 28 Am. Rep., 88.
White vs. White, 5 Barb., 483.

After these adverse decisions the constitution of the State of New York was amended by adding the following words to Sec. 7, Article 1, of the constitution.

> "General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dikes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purpose."

After this amendment to the constitution the legislature passed an act providing that any person owning agricultural land might institute proceedings for the drainage thereof and for the construction of drains and dikes on the lands of others, and providing further that the expense thereof should be assessed against various lands.

This statute was before the court in the Tuthill case. There were two questions involved: (1) Was the statute in violation of the state and federal constitution because of taking private property for a private use, and (2) was the act in violation of the state constitution because it authorized the assessments against lands other than those of the petitioner. Judge Gray wrote the chief opinion, wherein he stated that the legislative act in question was in violation of the 14th amendment to the federal constitution, for

the reason that it took private property for a strictly private use, and that such was true notwithstanding the state constitution as amended authorized the proceedings as provided in the statute; or, in other words, Judge Gray held that the constitutional provision of the state was in violation of the 14th amendment to the federal constitution. But Judge Gray further held that the act violated the state constitution because the latter contemplated that the expense of the improvement should be paid by the persons seeking to make the improvement and could not be levied against other property. Judge Haight concurred in the views expressed by Judge Gray. Judges O'Brien, Landon and Werner concurred in the opinion only on the second ground above mentioned, and Chief Justice Parker in concurring said:

> "While I agree with Judge Gray that the statute under consideration is in violation of the state constitution and therefore concur with him in the result, I am at the same time confident that it was the design of the recent amendment to Section 7 of Article 1 of the constitution to authorize legislation providing a workable scheme by which to secure the drainage of tracts of land, whether large or small, in order to provide for their proper utilization, thus establishing it to be a part of the fundamental law of the state that such drainage constitutes a public use, and that such section is not in

conflict with the federal constitution. "

It would therefore appear that two of the judges held that the act was in violation of the 14th amendment to the federal constitution because it authorized the taking of private property for a strictly private use, and four of the judges, including the Chief Justice, were of the opinion that the taking authorized by the constitution and the statute was a taking for a public use and was not in violation of the federal constitution.

It seems to us, therefore, perfectly manifest that not only does our constitution by necessary implication provide that the taking of a private way of necessity is for a public use, but that the highest court of the state has expressly so construed the constitution.

That this court will adopt and be bound by the construction given by the highest court of the state to a state statute or constitution is, we believe, finally settled.

Great Western Teleg, Co. vs. Purdy, 162 U. S. 329; 40 Law Ed., 986.
Lombard vs. W. Chicago Park, 181 U. S., 33; 45 Law Ed., 731.
Noble vs. Mitchell, 164 U. S., 367; 41 Law Ed., 472.
Smiley vs. Kansas, 196 U. S., 447; 49 Law Ed., 546.
Gatewood vs. N. Carolina, 203 U. S., 531; 51 Law Ed., 305.

Louisville & N. R. Co. vs. Kentucky, 183 U. S., 503; 46 Law Ed., 298.

In their brief plaintiffs in error undertake to give a very unique but strained construction to the portion of the constitution previously quoted. They say that the private way of necessity mentioned in the constitution means a private way of necessity for agricultural, domestic or sanitary purposes and does not include other private ways of necessity. Counsel do not give their reasons for their construction and we believe no reason can be given. The constitutional provision reads that "private property shall not be taken for private use, except for private ways of necessity and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes." The construction given to this clause by the plaintiffs in error would eliminate the word "and" immediately following the word "necessity" and thereby change the entire meaning of the provision; the construction which plaintiffs in error seek to give can be justified only on the ground of striking out the conjunctive "and."

But the highest court of the State of Washington has expressly construed this constitutional provision as including not only private ways of necessity but private ways for drains, flumes, etc.

State ex rel Mountain Tbr. Co. vs. Superior Court, 77 Wash., 585.
State ex rel Grays Harbor Logging Co. et al. vs. Superior Court, 82 Wash., 503.
State ex rel Galbraith vs. Superior Court, Supra.

The legislature of the state has,in the way of necessity act above quoted, construed the constitutional provision, in the same way our courts have construed it.

Since the construction given by the highest court of this state happens to be contrary to the construction given by counsel for plaintiffs in error, this court will, under the decisions above cited, follow the construction given by the highest state court.

(C) WASHINGTON DECISIONS.

If our contention last contended for be right, then it is immaterial what the courts of the State of Washington may have held concerning the scope and meaning of the words "public use," but it is interesting to review some of our decisions on this feature of the question.

The same statute which is in controversy in this action has been upheld by the Supreme Court of the State of Washington in three separate cases.

State ex rel Mountain Tbr. Co. vs. Superior Court for Cowlitz County, 77 Wash., 585.

State of Wash., ex rel Grays Harbor Loggiing Co. et al vs. Superior Court for Chehalis County, 82 Wash., 503.
State of Wash. ex rel Preston Mill Co. vs. Superior Court for King County (decided May 19, 1916), 157 Pac. (Wash.) 689.

These cases also held that the statute in question here was not in violation of the 14th amendment to the federal constitution.

The case at bar is exactly like the Mountain Tbr. Co. case supra and it was brought after the decision in that case was handed down. In that case the plaintiff owned and operated a private logging railroad and it sought to condemn a private way of necessity for its road over and across the lands owned by the respondent, in order that it might convey its timber from lands owned by it to market. The court **en banc** reviewed the case and every member of the court concurred in the opinion holding the act in question here to be constitutional under the state constitution and not in violation of the 14th amendment to the federal constitution. It held that the act is promotive of public welfare and public benefit. The court in part said:

> "The respondents contend that the term 'private ways of necessity' must be given its common law meaning. The theory of the common law is that where land is sold that has no out-

let, the vendor, by implication of the law grants one over the parcel of which he retains ownership * * * It follows that if the argument is sound and the legislature is without power to define the term 'private ways of necessity' and establish the procedure for the taking, the constitutional provision is without meaning * * * * We think the legislature acted within its constitutional powers in defining a 'private way of necessity'and establishing the procedure for making the right available. As defined, it is promotive of the public welfare, in that it prevents a private individual from bottling up a portion of the resources of the state. * * * * The right of property is a legal right and not a natural right, and it must be measured always by reference to the rights of others and of the public. If this be true, then there can be no universal law which may in the absence of constitutional restrictions, forbid a state from providing for the condemnation of private ways of necessity in furtherance of the development of its material resources. * * * * The taking of private property for private use for the promotion of the general welfare, upon notice and hearing and the payment of compensation, is not incompatible with due process of law, as guaranteed by the federal constitution."

In the other two cases cited above the court practically did nothing more than refer to its decision in the Mountain Tbr. Co. case and approve of the same.

In the case of State ex rel Galbraith vs. Su-

perior Court, supra, the court expressly upheld that portion of the constitutional provision under discussion, which provides for "drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes," on the ground that public welfare and the development of the resources of the state would thereby be greatly enhanced. There the court said:

> "It is the law in this state, as it appears to be in many Western states having large areas of arid land capable of being reclaimed or rendered more productive by irrigation, that the test of public use in the acquiring of water rights and rights of way for canals and ditches to convey water to land for the purpose of irrigating the same is not necessarily the service the parties seeking to acquire such rights may be compelled to render to the public in connection therewith. * * * * The very thought of agriculture in connection with this vast arid portion of our state, suggests irrigation in connection therewith. These facts and conditions were well known at the time of the making of our constitution, and it seems idle to doubt that they were in the minds of both the constitution framers and the people in the making and adoption of that instrument as the fundamental law of the state. * * * * The benefit to the public which supports the exercise of the power of eminent domain for purposes of this character, is not public service, but is the development of the resources of the state and the increase of its wealth generally, by

which its citizens incidentally reap a benefit."

In the case of Lewis County vs. Gordon, 20 Wash., 80-89, the question involved concerned a statute based upon our constitutional provision with reference to drains for agricultural purposes, and the court said:

> "Neither is the law open to the objection that private property is taken for private use. The construction of ditches for drainage of land otherwise useless for agricultural purposes is recognized as a public use."

Counsel for plaintiffs in error will doubtless refer to the case of Healy Lbr. Co. vs. Morris, 33 Wash., 490. The facts in that case were that the Legislature had passed an act authorizing the condemnation of rights of way for logging roads, and provided that any owner of timber lands desiring to cut and remove the timber should have a right of way for a logging railroad over the lands of others and should have the right to exercise the power of eminent domain. It will be observed that this act does not define or have any reference to a way of necessity, and was, therefore, infinitely broader than the act in question here. The court held that the words "private way of necessity" used in our constitution, meant the common law way of necessity, or at any rate it would be so construed until the Legislature had defined a pri-

vate way of necessity as provided by the constitution. But the holding of the court in this regard was necessarily overruled in the Mountain Tbr. Co. case, supra, for in that case the court expressly held that the private way of necessity referred to in the constitution was not the common law way of necessity. It is also true that in the Healy case the court held that the words "public use" in our constitution should be given their strict meaning and not the liberal meaning of public advantage or benefit, for after discussing the question the court says:

> "But from a consideration of all the authorities and from our own views on construction, we are of the opinion that the use under consideration must be either a use by the public or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state."

If the court in that case meant to apply its doctrine to private ways of necessity and to drains, flumes and ditches for agricultural, domestic and sanitary purposes, then it must be conceded that that case was overruled in the later cases of Mountain Timber Co. vs. Superior Court, supra, and in Galbraith vs. Superior Court, supra. It would appear manifest, however, that in the Healy case the court was considering the general meaning of the words

"public use" and was not considering the meaning of those words as applied to the private way of necessity, drains and ditches, etc. expressly mentioned in the constitution. Therefore the doctrine of the Healy case cannot be considered as controlling here. The court in that case did not have before it the question of way of necessity.

In the case of Sultan R. & Tbr. Co. vs. Great Northern R. Co., 58 Wash., 604-612, the court, in speaking of the Healy Lbr. Co. case, said:

> "It is true we did there hold that a logging company performing no public functions was without power to condemn a way for a logging road, notwithstanding the legislature had purported to confer on it that power, but the question of right of a logging company to condemn for such a way when the way was one of necessity was neither presented nor decided."

It would seem that the words "public use" in so far as they apply to a private way of necessity must be construed as meaning "public benefit" or "public welfare."

But plaintiffs in error undertake to show our construction of the words "public use" is not in accordance with but in violation of the policy of the people of the State of Washington as expressed in various proposed constitutional amendments. Their brief cites the constitutional amendment submitted to the people as shown

by the session laws of 1905, chap. 65 and as later submitted to the people as shown by session laws of 1907, chap. 69. They say these proposed amendments were for the purpose of giving to logging railroads rights of way for logging purposes and that the people refused on two separate occasions to so amend the constitution. Because the people so voted in these instances cannot be construed to form the public policy of the State of Washington as against necessary private rights of way. The two proposed constitutional amendments sought to give private logging railroads the unlimited power of eminent domain and did not, as our present statute does, limit the proposed right of way to private ways of necessity. In fact the question of private ways of necessity for logging railroads was not submitted to the people at all. Those proposed amendments sought to authorize private railroads to obtain "rights of way * * * * for lumbering purposes, or for the removal of timber and timber products."

It is true that there is a statute of the State of Washington which authorizes a toll logging railroad to condemn and appropriate rights of way (Session laws 1905, Chap. 82) but that statute is one very different from our private way of necessity statute. It requires that the toll road should haul any and all timber products

which are brought to it for that purpose and it becomes a common carrier in so far as the hauling of timber products are concerned and is therefore controlled by the state public service commission.

The brief of plaintiffs in error further contends that the taking in this instance is not for a public use because the statute in question does not anywhere state that such taking is for public use or public benefit. In their argument they seem to forget that the constitution of the State of Washington provides that:

> "whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public."

It is perfectly plain that had this statute declared that the public necessity or public benefit required the taking of private ways of necessity, the court would not have been permitted to consider such feature of the statute. However, the mere passage of the statute by the legislature must be considered as an assertion upon the part of the legislature that the taking of private ways of necessity is for the public benefit.

(D) SOME SIMILAR DECISIONS OUT OF THIS COURT.

We will now call attention to a number of decisions out of this court which have upheld as not in violation of the federal constitution, statutes which authorized a taking by the power of eminent domain in instances where the taking was much more of a taking for strictly private use than is involved in this case. In this connection we cite the following cases:

Clark vs. Nash, 198 U. S. 361; 49 L. Ed. 1085.

Hairston vs. Danville etc., Railroad Co., 208 U. S. 598; 52 L. Ed. 637.

Strickley vs. Highland Boy Gold Mining Co., 200 U. S. 527; 50 L. Ed. 581.

Mo. Pac. Railroad Co. vs. Neb. 164 U. S. 403; 41 L. Ed. 489.

Falbrook Irrigation Dist. vs. Bradley, 164 U. S. 112; 41 L. Ed. 369.

Union Lime Co. vs. Chicago & Northwestern Ry. Co. 233 U. S. 211; 58 L. Ed. (U. S.) 924.

Mt. Vernon-Woodberry Cotton Duck Co. vs. Alabama Interstate Power Co., a decision handed down by this court January 24, 1916, and published in current Advance Sheets, number 7, page 234.

O'Neill vs. Leamer, 3 current Adv. sheets, U. S. Rep. 54.

Otis Co.'s Ludlow Mfg. Co., 50 L. Ed. (U. S.) 696.

In the case of Clark vs. Nash, supra, the facts were that the statute of Utah authorized condemnation by a private land owner, of a right of way across his neighbor's land for an irrigation ditch, to enable the condemning party to obtain water to irrigate his own land. The contention was that the statute was in violation of the 14th amendment to the federal constitution, for the reason that it authorized the taking of private property for a private use. This court, in upholding the statute, in part said:

> "But whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of

> which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. * * * This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a state, as also its courts, must, in the nature of things, be more familiar with such facts, and with the necessity and occasion for the irrigation of the lands, than can any one be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their due weight with the state courts."

In the case of Hairston vs. Danville, etc., supra, the question involved was the constitutionality of a statute of Virginia concerning eminent domain. The highest court of the state had held that the use contemplated by the statute, while in some regards a private use, was in reality a public use, and this court in upholding the statute said:

> "The condemnation of land in this case has been held by the courts of Virginia to be authorized by the constitution and laws of that state, and we have no right to review that aspect of the decision. The law of Virginia permits no exercise of the right of eminent domain except for public uses. Therefore it must be assumed that this taking was held to be for public uses, although there was no specific finding of the fact, but only a general judgment of condemnation. * * * * The rule of the state decision is clearly established, and we have no occasion here to

consider the varying reasons which have influenced its adoption. But when we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question. The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long established methods and habits of the people. * * * * The propriety of keeping in view by this court, while enforcing the 14th amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justified and acted upon in Fallbrook Irrig. Dist. vs. Bradley; Clark vs. Nash; and Strickley vs. Highland Boy Gold Mining Co.—ubi supra. What was said in those cases need not be repeated here. No case is recalled where this court has condemned, as in violation of the 14th amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws. * * * * We have found nothing in the federal constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of the right of way over the land of

> another for an aerial bucket line; or of the right to flow the land of another by the erection of a dam. It remains for the future to disclose what cases, if any, of taking for uses which the state constitution, law and court approve will be held to be forbidden by the 14th amendment to the constitution of the United States."

The case of Strickley vs. Highland Boy Gold Min. Co. supra was a proceeding begun by a private mining corporation to condemn a right of way for an aerial bucket line across a placer mining claim owned by another person. The suit was maintained under a statute of the state of Utah which authorized such condemnation. In upholding the state statute this court referred to the case of Clark vs. Nash supra and said:

> "In discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test. * * * In such unusual cases there is nothing in the 14th amendment which prevents a state from requiring such concessions. If the state constitution restricts the legislature within narrower bounds, that is a local affair, and must be left where the state court leaves it in a case like the one at bar. In the opinion of the Legislature and the Supreme Court of Utah the public welfare of that state demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The

constitution of the United States does not require us to say that they are wrong."

The case of Otis Co. vs. Ludlow Mfg. Co. supra was concerning a dam for the purpose of storing water. The statute of Massachusetts authorized the condemnation of private property which was overflowed by such dam, and it was held that the statute was not in violation of the federal constitution.

In the case of Union Lime Co. vs. Chicago & N. W. R. Co. supra, the question involved was the right to acquire by the power of eminent domain, the right of way for a private spur railroad track. It was contended that the action amounted to a taking of private property for a private purpose. The highest court of Wisconsin, where the action was started, allowed the condemnation. There was a statute of that state permitting condemnation under such circumstances. It was contended that the statute upon its face authorized the taking of private property for a private use. The court said:

> "It is said, in the first place, that the statute does not declare in terms or by necessary implication that the use for which the property is to be taken is a public use. But this contention is plainly without merit, as the statute must be read in the light of the construction placed upon it by the state court, which has held the described use to be a public one."

The court further said:

> "The assignments of error come to the single point—as to the character of the use. The state, through its highest court, declares the use to be a public one, and we should accept its judgment unless it is clearly without ground."

It was further contended in this case that the finding of the state court that the use is a public one, was not supported by the evidence. With reference to this matter the court said:

> "It is also contended by the plaintiff in error that the finding by the state court that the use in the present case is a public one is not supported by the facts. But this criticism of the court's finding is in substance a repetition of the argument that is urged against the validity of the statute, and what has been said upon that point is applicable."

The case of Fallbrook Irrig. Dist. vs. Bradley supra involved the validity of an irrigation act of the State of California. The court, speaking of its powers with reference to the 14th amendment to the federal constitution, said:

> "It never was intended that the court should, as the effect of the amendment, be transformed into a court of appeal, where all decisions of state courts involving merely questions of general justice and equitable considerations in the taking of property should be submitted to this court for its determination. * * * There is no specific

> prohibition in the federal constitution which acts upon the states in regard to their taking private property for any but a public use. The 5th amendment which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the federal government as has many times been decided. * * * *
>
> "It is obvious, however, that what is a public use frequently and largely depends on the facts and circumstances surrounding the particular subject matter in regard to which character of the use is questioned."

Hereinafter we quote more fully from this decision.

The recent case of O'Neill v. Leamer, 3 Cur. Advance Sheets, U. S. Rep., 54, was concerning a law of the State of Nebraska with reference to the drainage of lands. The court said:

> "States may take account of their special exigencies and when the extent of their arid or wet lands is such that a plan for irrigation or reclamation according to districts may fairly be regarded as one which promotes the public interest, there is nothing in the federal constitution which denies to them the right to formulate this policy or to exercise the power of eminent domain in carrying it into effect. With the local situation the state court is peculiarly familiar and its judgment is entitled to the highest respect."

Hereinafter we quote more fully from this case.

The brief of plaintiffs in error states that the foregoing cases are inapplicable because the statutes in these states declared the use to be a public use and the lower court in each instance held the contemplated use to be public, whereas our statute does not so proclaim and the state court here did not discuss the question of public use. It must be remembered that our constitution imposes upon the court and not the legislature the duty to determine the question whether the contemplated use be public and that in the case of Mountain Timber Co. vs. Superior Court, supra, the state court held that the act in question was "promotive of the public welfare in that it prevents a private individual from bottling up a portion of the resources of the State."

(E) STATE DECISIONS IN SIMILAR CASES.

Upon investigation we find that statutes similar to the one in question have been upheld by the decisions in many state courts even where there was no constitutional provision, as here, to assist the holding. We cite the following of such cases:

Ortiz vs. Hansen, 83 Pac. (Colo.) 964.

Los Angeles County vs. Reyes, 32 Pac. (Cal.) 233.

Jones vs Venable, 120 Georgia 1.

Latah County vs. Peterson, 16 L. R. A. (Idaho) 81.

Bell vs Lamborn, 20 L. R. A. (Colo.) 241.

Consolidated Milling & Trading Co. vs. Gold Mining Co. 150 Pac. 313.

In re Private Road, 112 Pa. State (Pa.) 183.

Inspiration Consolidated Copper Co. vs. New Keystone Copper Co. 144 Pac. (Ariz.) 277.

Grover Irrigation & Land Co. vs Lovella Ditch Co., 131 Pac. (Wyo.) 43.

Lamborn vs. Bell, 32 Pac. (Colo.) 989.

Goldfield Consolidated Milling & Trans. Co. vs Old Sandstrom Annex Gold Min. Co., 150 Pac. (Nev.) 313.

Crystal Park Co. vs. Morton, 146 Pac. (Colo.) 566.

Billings Sugar Co. vs. Fish, 106 Pac. (Mont.) 565.

Spratt vs. Helena Power Trans. Co. (Mont.) 94 Pac. 631.

Dayton Gold & Silver Min. Co. vs. Seawell, 11 Nev. 394.

Ellinghouse vs. Taylor (Mont.) 48 Pac. 757.

Butte, A. & P. Ry. Co. vs. Mont. U. Ry. Co., 41 Pac. (Mont.) 232.

Blackwell Lbr. Co. vs. Empire Mill. Co. (Ida.) 155 Pac. 680.

In re Petition John B. Tuthill, 163 N. Y. 133.

Potlatch Lumber Co. vs. Peterson, 88 Pac. (Idaho) 426.

Ozark Coal Co. vs. Pennsylvania Etc., Co., 134 S. W. (Ark.) 634.
Miocene Ditch Co. vs. Jacobsen, 146 Fed. 680.
Gold Mining Co. vs. Parker, 59 Ga. 419.
Stewart vs. Great Northern Ry. Co., 33 L. R. A. (Minn.) 427.
Vol. 2, Sec. 1066, McKinney Irrigation & Water Rights.
Nichols Em. Domain, Sec. 253.
Great Falls Mfg. Co. vs. Fernald, 47, N. H., 444.

In the case of Goldfield Consol. Milling & Transp. Co. v. Old Sandstrom Annex Gold Mining Co., supra, the facts were that one private mining company was seeking to condemn certain private lands for tailings as a result of the operating of a private mine, by virtue of a statute of the State of Nevada. The court held the statute to be valid and that the use for which the property was sought to be condemned was, under the public policy of the state, a public use.

In the case of Los Angeles County vs. Reyes, supra, the California statute provided that a private road might be opened for the convenience of one or more residents and that the power of eminent domain might be used to acquire the right of way. It was held that while the principal use of such a road might be for the petitioner, it is also for the use of the public in deriving

the benefit of his products and that the Legislature had power to declare it a public use, for which the right of eminent domain may be exercised.

In the case of Crystal Park Co. vs. Morton, supra, the Park Company instituted an action to condemn a right of way for a private road across the lands of the defendants. The constitution of the State of Colorado provides:

> "That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reserviors, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes."

The court held that the private ways of necessity mentioned in the constitution were not such ways as were understood at the common law, and that the plaintiff was entitled to condemn.

In the very recent case of Blackwell Lumber Co. vs. Empire Mill Co., supra, the plaintiff corporation commenced action for condemnation of right of way for a private logging railroad. The constitution of Idaho provided that:

> "The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for the rights of way for the construction of canals, ditch-

> es, flumes or pipes to convey water to the place of use, for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof * * * * or any other use necessary to the complete development of the material resources of the state or the preservation of the health of its inhabitants, is hereby declared to be a public use and subject to the regulation and control of the state."

The court held that the timber industry of the state was a paramount one and that the condemnation was authorized by the constitution.

In the case of Ortiz vs. Hansen, supra, the facts were that Hansen on behalf of himself and others instituted suit to acquire by condemnation certain lands for the purpose of making an artificial channel to carry water to irrigate certain private lands. The statute under which the action was brought provided that if any person owns farming land which needs irrigation, he may, if necessary, take and condemn lands for right of way ditches, and the court held that such statute was constitutional and that had the suit been brought on behalf of Hansen alone he might have maintained it.

The Georgia constitution provides that private ways of necessity may be obtained upon payment of just compensation, and in the case of Jones vs. Venable, supra, the Georgia courts held that a private person or corporation actual-

ly engaged in the business of quarrying granite or other stone may exercise the power of eminent domain for the purpose of a private railroad across the lands of others, which is necessary for the successful prosecution of the business.

The constitution of Idaho with reference to eminent domain, provides that the necessary use of lands for reservoirs and for irrigation purposes and for rights of way for the construction of canals, etc., is necessary to the complete development of the resources of the state, and in the case of Latah County vs. Peterson, supra, the court, referring to this provision of the constitution, said:

> "This provision is certainly sufficient to authorize the Legislature to provide for the establishment of by-ways, or pent-ways, as they are sometimes called, or private roads, which are for the use of any one who may desire to use them. The necessity for such private roads is apparent when it is stated that it would be impossible to improve very many valuable tracts of land in this state which are not reached by public highways, unless this power existed. Such roads are, therefore, necessary to the complete development of the material resources of the state. We are therefore of the opinion that Section 933, Idaho Revised Statutes, is constitutional."

The State of Montana has a statute which authorizes a land owner to exercise the power

of eminent domain for the purpose of condemning a right of way for an irrigation ditch. The constitution of that state provided that the use of all waters and the right of way over the lands of others for ditches, etc., should be a public use, and in the case of Ellinghouse vs. Taylor, supra, this statute was upheld as not in violation of the constitution. The court said that "the reclamation of one small field by means of artificial irrigation promotes the development and adds to the taxable wealth of the state, as well as the reclamation by the same means of a number of fields. The only difference is the extent of the benefit," and that the taking was for a public use and that the statute does not violate the constitution of the United States.

In the case of Mining Co. vs. Seawell, 11 Nev., 394, it was held that the condemnation of a right of way for a tunnel, for the operation of a mine, was lawful and that the purpose for which the tunnel was appropriated was a public use.

In the case of Byrnes vs. Douglas, 83, Fed. 45, it was held that a statute of Nevada authorizing condemnation for the right of way of a mining tunnel was constitutional, upon the ground that the taking was for a public use.

We deem it unnecessary to call particular

attention to more of the list of cases last above cited.

Mr. Lewis at Section 206-A, Volume 1, of his work on Eminent Domain (2d Edition), speaking with reference to the 14th amendment to the federal constitution and the application thereof to eminent domain matters, says:

> "But in thus applying the federal constitution the broadest possible construction should be given to the eminent domain power. The words 'public use' import a limitation upon the eminent domain power with respect to the purposes for which it may be exercised. The states are not compelled to retain this limitation. In its absence the power may be exercised for any purpose which promotes the general welfare of the state. This would include many cases where the property taken is devoted to strictly private uses, as in the case of private roads, mills, drains and the like."

At Sec. 49, Vol. 10, R. C. L., it is said:

> "In several of the states lumbering is an industry of the first importance, and the difficulty of bringing out logs from the timber lands to the public highways and railroads has been a serious one. It is frequently necessary to cross private land, as the general railroad and highway systems do not penetrate into the forest districts on account of the sparsity of the population."

A large portion of the State of Washington is heavily timbered. Its timber is its one great natural resource. The land is hilly and mountain-

ous. The building and maintenance of roads is very difficult and expensive. Much of the timber is over-ripe and decaying. The material prosperity of every individual, particularly in Western Washington, is dependent to a very large extent upon the bringing of this timber to market. The public is deeply interested in having the timber brought to market, for most of the great factories are employed in working this timber into a saleable product. The public is deeply interested in having many individuals own the timber and bring it to market. If the owner of a quarter section of this timber land may refuse to permit others to bring their timber products through his lands, he would bottle up the resources of the state and greatly hamper its prosperity. When it is considered that a large percentage of the population is either the owner of timber or directly interested in the removal thereof to market and that the prosperity of every town and city in the state is dependent most of all upon the timber industry, it becomes at once manifest that the taking of this necessary right of way is a taking in which the public is deeply interested. The ability to obtain these ways of necessity is, as our Supreme Court held in the Mountain Tbr. Co. case supra, "promotive of the public welfare, in that it prevents a private individual from bottling up a portion of

the resources of the state." Rights of way for the removal of timber in the State of Washington, is as great a public necessity and public benefit as the right of way for irrigation ditches in Utah or Kansas or Nebraska, or the right of way for mining purposes and uses in Utah or Nevada.

After all, it is up to the highest court of the state to decide when the taking of private property is of sufficient importance to the public interest to authorize the exercise of the power of eminent domain.

(F) CONSTITUTIONS OF VARIOUS STATES.

Probably the direct question involved here is not whether the legislative act is in violation of the 14th amendment to the federal constitution, but is the eminent domain clause of the constitution of the state in violation of that amendment.

Upon examination we find that a good many of the states of the Union have constitutional provisions similar to ours, with reference to private ways of necessity and kindred subjects.

The Constitution of Alabama says:

> "Nor shall private property be taken for private use, or for the use of corporations,

other than municipal, without the consent of the owner; provided, however, that the general assembly may, by law, secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved."

Article 1, Section 24.

The Constitution of California provides that:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use."

Article 14, Section 1.

The Constitution of Colorado provides:

"That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity and except for reservoirs, drains, flumes or ditches, on or across the land of others, for agricultural, mining, milling, domestic or sanitary purposes."

Article 2, Section 14.

The Constitution of Georgia provides that:

"In cases of necessity, private ways may be granted upon just compensation being first paid; and with this exception private property shall not be taken, save for public use, and then only on just compensation * * *."

Article 1, Section 17.

The Constitution of Idaho provides that:

"The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use, for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use."

Article 1, Section 14.

The Constitution of Illinois provides that:

"Private property shall not be taken or damaged for public use without just compensation. * * * * The general assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts and vest the corporate authorities thereof, with power to construct and maintain levees, drains and ditches * * * *."

Article 4, Section 31.

The Constitution of Michigan provides that:

"The property of no person shall be taken for public use without just compensation

therefor. Private roads may be opened in the manner to be prescribed by law * * * *."

Article 18, Section 14.

The Constitution of Missouri provides that:

"No private property can be taken for private use with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law; * * * *."

Article 2, Section 20.

The Constitution of Montana provides that the use of water and rights of way over the lands of others for ditches and flumes shall be a public use and that "private roads may be opened in the manner to be prescribed by law * * *."

Article 3, Section 15.

The Constitution of New York provides that:

"General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dikes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes."

Article 1, Section 7.

The Constitution of South Carclina provides that private property shall not be taken

except for public use, "provided, however, that laws may be made securing to persons or corporations the right of way over the lands of either persons or corporations, and for works of internal improvement, the right to establish depots, stations, turn-outs * * *."

Article 1, Section 23.

The Constitution of Wyoming provides that:

> "Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches, on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation."
>
> Article 1, Section 32.

It will thus be observed that the states of Colorado, Georgia, Missouri and Wyoming have constitutions concerning the right of eminent domain, in words almost identical with the constitution of the State of Washington, and so far as we have been able to learn, no court has ever held that such constitutional provisions violate any part of the federal constitution.

To hold that the private way of necessity provision of our state constitution violates the 14th amendment to the federal constitution, would in effect destroy the general scheme pro-

vided by the constitutions in many states for the public welfare of those states.

In Fallbrook Irrigation Dist. case, supra, the court said that:

> "If the act violates any provision, expressed or properly implied, of the federal constitution, it is our duty to so declare it, but if it do not, there is no justification for the federal courts to run counter to the decisions of the highest state courts upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."

To hold that the private way of necessity provision of our constitution is in violation of the federal constitution would be tantamount to holding that the provision of the same section of the constitution with reference to drains, flumes or ditches for agricultural, domestic or sanitary purposes, is also in violation of the federal constitution, and by so holding, the whole scheme adopted by the people of the State of Washington for their general advancement and benefit would be destroyed.

(G) IRRIGATION, DIKES AND DRAINS.

It is true that many of the courts have in general terms held that public use meant public

occupation and not public benefit, but in nearly every state where such general decisions prevail we find that whenever necessity requires, the courts of those states easily depart from the strict construction to a liberal construction.

In order to uphold the mill-dam acts, the grist mill acts, the acts with reference to rights of way for ditches for irrigation purposes and for drainage purposes, and with reference to dikes, the courts have been required to make a liberal construction of the constitution; for after all is said, all such acts must, in the main, be upheld, if upheld at all, upon the theory of advancement of the material resources of the state and for the general benefit of the people. The farther we come into the great states of the West, where irrigation is necessary, where mining is the principal industry and where great forests grow in the valleys, hills and mountains, the more do the courts find it necessary for the material advancement of those states to give a liberal construction to the term "public use.."

As was said by Wiel on Water Rights, 2d Ed., Sec. 263:

> "The situation of a state and the possibilities and necessities for the successful prosecution of various industries and the peculiar condition of soil or climate or other peculiarities, being general, notorious and

acknowledged in the state, so as to be judicially known and exceptionally familiar to the courts without investigation, such conditions justify a state court in upholding a statute authorizing the taking of another's private property by one individual for his own enterprise, where it believes by reason of the above, that such a taking will, through its contribution to the growth and prosperity of the state, constitute a public benefit, and the Supreme Court of the United States will follow the decision of the state court in such a case."

Nearly every state of the Atlantic coast and nearly all those of the Middle West, as well as some others, have for years had on their statute books General Mill Acts. Almost without exception these acts have been upheld upon the principle of benefit to the public and advancement to the state's resources.

In the case of Head vs. Amoskeag Mfg. Co., 28 Law Ed. (U. S.) 889, the New Hampshire Mill Act was before this court and it was upheld upon the principles above announced.

In the case of Otis Co. vs. Ludlow Mfg. Co., 50 Law Ed. (U. S.) 696, a statute of Pennsylvania authorizing a private corporation to construct and maintain a dam for the purpose of creating water power, was upheld by this court as not in violation of the 14th amendment to the

federal constitution.

In the case of O'Neill vs. Leamer, supra, the question was concerning a drainage district statute of Nebraska. The Nebraska court had upheld the statute, which authorized the exercise of eminent domain, on the ground of public benefit. This court said:

> "The plaintiffs in error contend that the plan is simply one for the private advantage of the property owners, and they direct special attention to the provision of the statute that the fact that the district is to contain 160 acres or more of wet or over-flowed lands, shall be sufficient cause for declaring the 'public utility' of the improvement. But we do not find that the supreme court of the state has sustained the act as applicable to any case in which it was considered, upon a judicial examination of the facts, that the undertaking served private interests alone. On the contrary, we assume it to be the law of Nebraska that property may be taken in the furtherance of reclamation projects only where it is found that the public welfare is involved. * * * *. In our opinion, it is too late in the day to contend that the irrigation of arid lands, the straightening and improvement of watercourses, the building of levees and the drainage of swamp and over-flowed lands for the improvement of health and the comfort of the community, and the reclamation of waste places and the promotion of agriculture, are not all and every of them subjects of general and public concern, the promo-

tion and regulation of which are among the most important of governmental powers, duties and functions."

This court further said:

"We have repeatedly said that the provisions of the 14th amendment, embodying fundamental conceptions of justice, cannot be deemed to prevent a state from adopting a public policy for the irrigation of arid lands and for the reclamation of wet or overflowed lands. States may take account of their special exigencies and when the extent of their arid or wet lands is such that a plan of irrigation or reclamation according to districts may fairly be regarded as one which promotes the public interest, there is nothing in the federal constitution which denies to them the right to formulate this policy or to exercise the power of eminent domain in carrying it into effect. With the local situation the state court is peculiarly familiar and its judgment is entitled to the highest respect."

In the case of Fallbrook Irrigation Dist. vs. Bradley, supra, this court said:

"To provide for the irrigation of lands in states where there is no color or necessity therefor within any fair meaning of the term, * * * might be regarded by courts as an improper exercise of legislative will, and the use might not be held to be public in any constitutional sense, no matter how many owners were interested in the scheme. On the other hand, in a state like California, which confessedly embraces millions of

acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. * * The use for which private property is to be taken must be a public use, whether the taking be by the exercise of the right of eminent domain or by that of taxation. * * * To irrigate, and thus to bring into possible cultivation, these large masses of otherwise worthless lands, would seem to be a public purpose and a matter of public interest, not confined to the landowners or even to any one section of the state. The fact that the use of the water is limited to the landowner is not, therefore, a fatal objection to this legislation. * * Irrigation is not so different from the reclamation of swamps as to require the application of other and different principles to the case."

The courts of nearly every state in the Union have upheld statutes with reference to drainage, diking, irrigation and similar purposes. Sometimes these statutes are expressly authorized by the constitution; sometimes the constitution or the legislative act authorizes districts to be formed, and in other instances one or more private individuals are authorized to exercise the right of eminent domain for these purposes. These acts have all been upheld upon the ground of public welfare and development of the resources of the state. We do not deem it

at all necessary to cite many of the authorities upholding acts of this character. In every instance, so far as we have been able to find, where the constitution has authorized the exercise of the power of eminent domain on behalf of a land owner, for the purpose of draining his land or diking it or irrigating it, the courts have, without hesitation, upheld such acts. The following authorities are, for the most part, where there were constitutional provisions permitting private individuals to exercise the power of eminent domain for the purposes mentioned, or where in the absence of constitutional provisions on the subject legislative acts of like character have been upheld by the courts:

Chronic vs. Pugh, 27 N. E. (Ill.) 415.
Blake vs. People, 109 Ill., 504.
Kinnie vs. Bare, 68 Mich., 623; 36 N. W., 672.
Coster vs. Tidewater Co., 18 N. J. Eq., 54.
Wurts vs. Hoagland, 114 U. S., 606.
In Re Tuthill, 49 L. R. A. (N. Y.) 781.
Norfleet vs. Cromwell, 70 N. E., 634.
Reeves vs, Treasurer of Wood County, 8 Ohio St., 333.
Thompson vs. Wood County, 11 Ohio St., 678.
Seely vs. Sebastian, 4 Ore., 25.
Donnelly vs. Decker, 58 Wis., 461.
Hagar vs, Reclamation Dist., 111 U. S., 701.

The case of Chronic vs. Pugh, supra, is an

illustration of cases of this character being upheld because of constitutional provision. In Illinois, Section 31 of Article 4 of the state constitution provided that:

> "The general assembly may pass laws permitting the owners of lands to construct ditches, drains and levees for agricultural, sanitary and mining purposes, across the lands of others."

The action in the case last cited was by a private individual to obtain the right to construct a tile drain from plaintiff's lands onto and part way across the adjoining lands belonging to the defendant, as he was authorized to do by the statutes of that state. The court said:

> "It is insisted that the statute under which this proceeding was instituted is unconstitutional, because it provides for the taking of the private property of one land owner for the private use of another. It is sufficient to say that said statute is clearly within the legislative power conferred upon the general assembly by Section 31 of Article 4 of our present state constitution."

Many more cases of like tenor might be cited, but we deem the foregoing to be sufficient to establish the principle involved.

The same reasoning and the same principle which impel the courts to uphold as constitutional, statutes of this character, will apply to the

statute in question here, when the highest court of the state has upheld the statute and declared the acquiring of private ways of necessity as necessary for the advancement of the material resources and welfare of the state.

(H) PRIVATE ROADS.

We have read a typewritten copy of that portion of the brief of plaintiffs in error with reference to private roads. Counsel are consantly using the phrase "private roads and private ways of necessity" as interchangeable and meaning the same thing. Necessarily there is a very great difference. For illustration, they speak of the case of Wild vs. Deig, 13 Am. Rep. 399, as being concerning private ways of necessity, but the case shows that it was concerning a statute with reference to private roads. Counsel fall into the same error in commenting on the case of Osborne vs. Hart, 24 Wisc., 89, and Witham vs. Osburn, 4 Ore., 319. Counsel also cite the constitutional provision of the State of New York, providing that "private roads may be opened in the manner to be prescribed for roads * * * " and say that the Supreme Court of New York has held that private ways of necessity cannot be acquired by eminent domain proceedings, and in support thereof cite the case of Taylor vs. Porter, 40 Am. Dec., 274.

It is true that in the Taylor case the court did hold as unconstitutional a statute of New York authorizing the laying out of strictly private roads, but that decision was rendered in 1843, and probably as a result thereof the New York constitution was amended in 1846 to provide for acquiring rights of way for private roads, and since the amendment of the constitution in this regard we have not been able to find any decisions out of the courts of New York holding that private roads cannot be obtained by exercise of the power of eminent domain.

We very gladly admit that the authorities on the question of the right to acquire private roads by means of eminent domain are divided and that probably the greater number of the courts have held against such power where the same is based upon a legislative enactment, but in a number of states there are constitutional provisions providing for acquiring rights of way for private roads and, so far as we have been able to learn, statutes in those states providing for private roads have been uniformly upheld.

At Sec. 167, Vol. 1, 2d Ed., Lewis on Eminent Domain, after discussing the authorities with reference to private roads and concluding that the majority of them held as unconstitu-

tional legislative acts providing for private roads, says:

> "In some states the laying out of private ways is expressly sanctioned by the constitution, or the constitution is construed as giving such authority. A constitutional provision authorizing the taking of lands for private ways of necessity, is not self-executing, and such ways cannot be laid out without statutory authority. When private ways are permitted by the constitution when certain conditions exist, these conditions must be affirmatively shown in order to justify the exercise of the power."

Some of the authorities which uphold private roads where there are constitutional provisions with respect thereto, are as follows:

Scheh vs. Detroit, 45 Mich., 626.
Ayres vs. Richards, 38 Mich., 214.
State vs. Stockhouse, 14 S. Carolina, 417.
Steele vs. County Commissioners, 83 Ala., 304.
Normandale Lbr. Co. vs. Knight, 89 Ga., 111.
Belk vs. Hamilton, 130 Mo., 292; 32 S. W., 656.
State vs. District Court, 14 Mont., 476; 37 Pac. Rep. 7.
Latah County vs. Peterson, 2 Idaho, 1118; 29 Pac., 1089.
Barr vs. Flynn, 20 Mo. App., 383.
Snyder vs Warford, 11 Mo., 513; 49 Am. Dec., 94.
Los Angeles County vs. Reyes, 32 Pac. (Cal.) 233.

Welton vs. Dickson, 57 N. W. (Neb.) 559.

In the note found on page 765, Cooley's Constitutional Limitations, 7th Ed., it is said:

> "To avoid this dificulty (the dificulty in obtaining rights of way for private roads) it is provided by the constitutions of some of the state, that private roads may be laid out under proceedings corresponding to those for the establishment of highways."

It may well be doubted, however, whether a discussion of the private road question is of very much assistance in determining the question of the private way of necessity statute under consideration here.

III.

DOES THE TESTIMONY SHOW A WAY OF NECESSITY?

The brief of plaintiffs in error will undertake to show that even if a private logging company has the constitutional right to acquire a way of necessity, yet the testimony in this case fails to show such a way and that the lower court was in error and the state supreme court was in error when they held to the contrary.

We do not understand that this question is open to this court. It is our understanding that this court will not, in a case of this character, consider the testimony to determine whether or

not the highest court of the state has decided in accordance with such testimony. We have always understood that, in a proceeding of this character, only questions of law could arise and that this court would not review any questions of fact.

Swope vs. Lethingwell, 105 U. S. 3, 26 L. Ed. 939.
Gardner vs. Bonestell, 180 U. S. 360, 45 L. Ed. 574.
Chrisman vs. Miller, 197 U. S. 313, 49 L. Ed. 770.

The Supreme Court of the State of Washington expressly found that the evidence showed that the Coats-Fordney Logging Co. required the right of way sought as a way of necessity. In fact nearly all of the decision of that court was the discussion of the testimony in so far as it showed that the way sought was a way of necessity.

However, we will briefly argue this point. The testimony shows that the Coats-Fordney Logging Co. owned the timber on about sixteen hundred acres of lands to the north of the lands through which it was seeking to acquire the right of way, and that there were approximately 60 million feet of timber on those lands (Record, pages 43 and 44). It had a logging railroad built and in operation to the south line of the

lands owned by the plaintiffs in error. Its logging operations were carried on exclusively by means of its logging railroad. It could not get to its timber over its own lands. The only other possible way of getting the timber to market would be down the east fork of the Wishkah River. That stream had been improved for log driving purposes by another company which operated on the river. To remove any of this timber into the waters of the river and thence to market it would have been necessary for the Coats-Fordney Logging Co. to cross over lands not owned or controlled by it and to acquire if possible a right of way for that purpose, except as to the timber located on the 160 acres in section 8. To remove the timber from section 30 into the river it would have been necessary to go over lands owned by others and there would be a haul of the timber to the river of less than a mile on the average. As to section 20 the average haul of the timber would be at least a mile and a half and it would be necessary to acquire a right of way over lands belonging to others. As to the southwest quarter of section 10 the haul would be a mile and a half to the river and here also a right of way would have to be acquired. There was no showing that the right of way which would be required to remove

the timber into the river could be acquired any more easily or readily than the right of way involved here. The river runs in part through the southwest quarter of section 8 and the timber on this 160 acres of land could profitably be put into the river and brought down that stream and both the trial court and the supreme court held "that no necessity exists for condeming a right of way for the removal of the timber from the southwest quarter of section 8 if it be considered as a tract separate from the other lands of the petitioner," but the court held that it could not be considered as a separate tract. An examination of the maps in the record will conclusively show that all this timber should be removed by the logging railroad of the Coats-Fordney Logging Co. It cannot well be argued by any person that the testimony fails to show a way of necessity as to any of the timber except that on the southwest quarter of section 8 and with reference to that timber the supreme court of the state said:

> "If the southwest quarter of section 8 which borders upon the east fork of the Wishkah River was the only property to be reached by the proposed road, it might well be held that there was not a sufficient reason to justify the condemnation of a private way of necessity for a logging road, since from that particular tract there is an

adequate outlet by water. The statute provides that when land is so situated with respect to other land that it is 'necessary for the proper use and enjoyment to have a private way of necessity' the right of condemnation exists. The word 'necessity' as used in the statute means reasonable necessity. In determining whether a reasonable necessity exists for the condemnation, it is necessary to look at the entire enterprise rather than to its segregated parts. The Coats-Fordney Logging Co. was conducting its logging operations by means of a logging railroad. To log in this manner it was already equipped. Only one of the four tracts of land which it was seeking to reach was located upon the river. To sustain the right to condemn so far as it pertained to reaching the other three tracts of land and to deny it as to this one would not seem very reasonable. The SE quarter of section 8 was only one of the ten quarter sections included in the enterprise."

Record page 162.

The argument of the supreme court is so strong and makes the necessity for the right of way so clear that we deem it unnecessary to do more than quote from the decision of the state supreme court.

As above indicated the court has construed the constitution and the statute to mean reasonable necessity and not an absolute necessity and this court is bound by such construction. In the case of State ex rel Mountain Timber Co. vs.

Superior Court, supra, the supreme court of Washington, construing the statute in question, said,

> "The word necessity means reasonable necessity."

To the same effect see Samish River Boom Co. vs. Union Boom Co., 32 Wash. 586.

As we understand it the argument of the plaintiffs in error on this question is based upon the idea that the word "necessity" used in the statute and the constitution means "absolute necessity" and since the highest court of this state has decided to the contrary, all argument of counsel for plaintiffs in error in this respect should fall.

In any event, if this court will review this question at all, it will review it only for the purpose of determining whether or not the decision of the state supreme court is so grossly erroneous as to manifestly bring about a result which this court could say was a violation of the elementary principles of justice. As was said by this court in the case of Falbrook Irrigation Dist. vs. Bradley,

> "There is no justification for the federal courts to run counter to the decisions of the highest state courts upon questions involving the construction of state statutes or

constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."

Concisely stated, our contention then is that the private way of necessity statute and constitutional provision of the State of Washington, is not in violation of the 14th amendment to the federal constitution, for the reason that the constitution of the state has declared that the taking of such private ways was necessary for the general advancement of the state and its people and was for a public use and not for a private use; and for the further reason that the highest court of the State of Washington having held that the statute is a taking for a public and not a private use, this court will follow in that respect the decision of the state court; and for the further reason that there is nothing in the federal constitution which requires this court to run counter to a general policy of a state adopted by its people and its courts for the material welfare of the state, and that this court will not hold the statute in violation of the 14th amendment unless the court is compelled to say that it authorizes a taking which under any and all circumstances is for a strictly private use.

WHEREFORE the defendants in error pray the court to affirm the decision of the state court.

Respectfully submitted,

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Attorneys for Defendants in Error.



GRAYS HARBOR LOGGING COMPANY ET AL. *v.* COATS-FORDNEY LOGGING COMPANY.[1]

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 132. Argued January 23, 1917.—Decided March 6, 1917.

In a proceeding to condemn land for a private railway, based on Washington Constitution, Art. I, § 16, and Laws 1913, c. 133, p. 412; Rem. & Ball. Ann. Code, §§ 5857-1, *et seq.*, and governed as to procedure by Rem. & Ball. Ann. Code, §§ 921-931, the Superior Court of Washington, after a hearing on the question of necessity, entered an order of condemnation and set down the cause for a jury trial to determine damages, etc.; thereupon condemnees took the case to the Supreme Court of the State by certiorari, alleging, *inter alia*, that the Law of 1913 violates the Federal Constitution; the Supreme Court entered judgment affirming the action of the Superior Court and remitting the cause thereto for further proceedings. *Held*, that the judgment of the Supreme Court of Washington was interlocutory and therefore not reviewable in this court under § 237 of the Judicial Code. *Wheeling and Belmont Bridge Co.* v. *Wheeling Bridge Co.*, 138 U. S. 287, questioned, if not overruled.

Although a federal question involved in state court proceedings be settled by interlocutory judgment, so that the decision becomes binding on the state tribunals as the law of the case before a final judgment occurs, this court is none the less free to determine the question when the final judgment is brought here by writ of error.

Writ of error to review 82 Washington, 503, dismissed.

THE case is stated in the opinion.

Mr. W. H. Abel, with whom *Mr. A. M. Abel* was on the briefs, for plaintiffs in error.

[1] The docket title of this case is: *State of Washington ex rel. Grays Harbor Logging Company and W. E. Boeing* v. *Superior Court of Washington for Chehalis County, Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company.*

Mr: William M. Smith, with whom *Mr. Alexander Britton*, *Mr. Evans Browne* and *Mr. F. W. Clements* were on the briefs, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The Coats-Fordney Logging Company, defendant in error, instituted a proceeding by petition in the Superior Court of the State of Washington for Chehalis County against Grays Harbor Logging Company and W. E. Boeing, wherein it sought to condemn and take certain of their lands situate in that county for the purpose of constructing and maintaining a logging railroad as a private way of necessity in order to bring its lumber to market. The proceeding was based upon the following provisions of the constitution and statutes of the State:

Section 16 of Article 1 of the constitution declares: "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, . . ." Under this constitutional provision the legislature passed an act (Sess. Laws 1913, c. 133, p. 412; Rem. & Ball. Ann. Code, §§ 5857–1, *et seq.*,) which provides that lands for the construction and maintenance of a private way of necessity may be acquired by condemnation, including within the term "private way of necessity" a right of way over or

through the land of another for means of ingress or egress and the construction and maintenance of roads, logging roads, tramways, etc., upon which timber, stone, minerals or other valuable materials and products may be transported and carried. The procedure is to be the same as provided for condemnation of private property by railroad companies. This refers us to Rem. & Ball. Ann. Code, §§ 921–931 (5637–5645), whereby it is provided, in substance (§ 921) that any corporation authorized by law to appropriate land for a right of way may present to the Superior Court of the county in which the land is situate a petition describing the property sought to be appropriated, setting forth the names of the owners and parties interested, and the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money; (§ 922) a notice of the petition stating the time and place where it will be presented to the court is to be served upon each person named therein as owner or otherwise interested; (§ 925) at the hearing, if the court be satisfied by competent proof that the contemplated use for which the land is sought to be appropriated is really a public use, or is for a private use for a private way of necessity and that the public interest requires the prosecution of such enterprise, and that the land sought to be appropriated is necessary for the purpose, the court may make an order directing the sheriff to summon a jury; (§ 926) at the trial the jury shall ascertain, determine, and award the amount of damages to be paid to the owners and other persons interested, and upon the verdict judgment shall be entered for the amount thus awarded; (§ 927) at the time of rendering judgment for damages, if the damages awarded be then paid, or, if not, then upon their payment, the court shall also enter a judgment or decree of appropriation, thereby vesting the legal title to the land in the corporation seeking to appropriate it;

(§ 929) upon the entry of judgment upon the verdict of a jury and award of damages the petitioner may make payment of the damages and costs of the proceeding to the parties entitled to the same by depositing the same with the clerk of the Superior Court, to be paid out under the direction of the court, and upon making such payment the petitioner shall be released from further liability, unless upon appeal the owner or other party interested shall recover a greater amount; (§ 931) "Either party may appeal from the judgment for damages entered in the superior court to the supreme court of the state within thirty days after the entry of judgment as aforesaid, and such appeal shall bring before the supreme court the propriety and justness of the amount of damages in respect to the parties to the appeal."

Plaintiffs in error opposed the petition for condemnation upon the ground, among others, that the Act of 1913 was contrary to the Constitution of the United States, and that petitioner sought to take their property for a private use and therefore without due process of law, in violation of that Constitution. After hearing testimony upon the question of necessity, the Superior Court entered an order of condemnation, and by the same order set the cause down for trial before a jury for the purpose of determining and assessing the damages and compensation. At this point, and before the cause could be brought to trial before a jury, plaintiffs in error applied for and obtained from the Supreme Court of the State a writ of certiorari for the purpose of reviewing the question of the constitutionality of the act and the right of petitioner to condemn their property for its right of way. The Supreme Court sustained the proceedings, 82 Washington, 503, and entered a judgment affirming the judgment of the Superior Court, and remitting the cause to that court for further proceedings. A writ of error was then sued out from this court under § 237, Jud. Code.

Defendants in error move to dismiss the writ of error on the ground that the judgment of the state court is not final. To this plaintiffs in error respond by saying that under the state practice the judgment of the Superior Court establishing the right of petitioner to acquire the property or right of way sought is final; that while an appeal will not lie from such a judgment to the Supreme Court, this is because the statutory provision for an appeal in condemnation cases is limited to the question of the amount of damages, and a general statute providing for appeals has been held not applicable to eminent domain proceedings, *Western American Co.* v. *St. Ann Co.*, 22 Washington, 158; that because an appeal will not lie the Supreme Court has held that a writ of certiorari or review will issue to bring before that court for determination the questions of use and necessity, *Seattle & Montana R. R. Co.* v. *Bellingham Bay & Eastern R. R. Co.*, 29 Washington, 491; and that by repeated decisions of that court it has been settled that after an order adjudging necessity has been made and a trial had to determine the amount of damages an appeal taken therefrom raises no question as to the right to condemn, but is confined to the propriety and justness of the amount of damages; *Fruitland Irrigation Co.* v. *Smith*, 54 Washington, 185; *Calispel Diking District* v. *McLeish*, 63 Washington, 331; *Seattle, Port Angeles & Lake Crescent Ry.* v. *Land*, 81 Washington, 206, 209; *State ex rel. Davis* v. *Superior Court*, 82 Washington, 31, 34. In this state of the local practice it is argued that the judgment that has been entered should be regarded as finally disposing of a distinct and definite branch of the case, and therefore subject to our review as a final judgment; leaving the ascertainment of the compensation and damages to be dealt with as a separate branch of the case. *Wheeling & Belmont Bridge* v. *Wheeling Bridge Co.*, 138 U. S. 287, 290, is cited in support of this contention, and certainly seems to lend color to it. But, notwithstanding

the decision in that case, we cannot regard a condemnation proceeding taken under the authority of the constitution of Washington and the Act of 1913 as severable into two distinct branches. The constitution forbids that the property be taken without compensation first made or ascertained and paid into court for the owner, and of course in case of controversy compensation cannot be made to the owner until the amount of it has been ascertained. It follows that the judgment entered by the Superior Court to the effect that petitioner was entitled to condemn and appropriate the land in question for its right of way must be construed as being subject to a condition that the proper compensation be first ascertained and paid.

As we read the decisions of the Supreme Court of the State, such judgments are not interpreted in any other sense; they are not described as final, nor as independent judgments. In two cases the term "order" and even "preliminary order" has been employed with respect to such judgments (*State ex rel. Pagett* v. *Superior Court*, 46 Washington, 35, 36; *Seattle, Port Angeles & Lake Crescent Ry.* v. *Land*, 81 Washington, 206, 209), and they are held reviewable by certiorari and not by appeal, not because they are final, or are independent of the subsequent proceedings ascertaining the damages, but because in Washington proceedings by appeal are statutory, and no statute has been enacted giving an appeal from the order or judgment determining the questions of use and necessity; by reason of which, the writ of certiorari is employed as a means of exercising the constitutional power of review.

The judgment, therefore, seems to us to be interlocutory, and the case to be within the authority of *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341; *Southern Railway Co.* v. *Postal Telegraph-Cable Co.*, 179 U. S. 641, 643; and *United States* v. *Beatty*, 232 U. S. 463, 466.

When the litigation in the state courts is brought to a

conclusion, the case may be brought here upon the federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the Supreme Court, 82 Washington, 503, as laying down the law of the case, this court will not be thus bound. *United States* v. *Denver & Rio Grande R. R. Co.*, 191 U. S. 84, 93; *Messenger* v. *Anderson*, 225 U. S. 436, 444; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 418.

The judgment brought up by the present writ of error not being a final judgment, within the meaning of § 237, Jud. Code, the writ must be

Dismissed.